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No. 98-1682-ATX Title: United States, et al., Appellants
v.
Playboy Entertainment Group, Inc.

Docketed: Court: United States District Court
April 19, 1999 for the District of Delaware

Entry Date Proceedings and Orders

Mar 8 1999 Application (98A753) to extend the time to file a jurisdictional statement on appeal from March 20, 1999 to April 19, 1999, submitted to Justice Souter.

Mar 10 1999 Application (98A753) granted by Justice Souter extending the time to file until April 19, 1999.

Apr 19 1999 Statement as to jurisdiction filed. (Response due May 19, 1999)

May 19 1999 Motion of appellee Playboy Entertainment Group, Inc. to affirm filed.

Jun 1 1999 DISTRIBUTED. June 17, 1999

Jun 4 1999 Reply brief of appellants United States, et al. filed.

Jun 21 1999 PROBABLE JURISDICTION NOTED.
SET FOR ARGUMENT November 30, 1999.

Jul 20 1999 Motion of Solicitor General to dispense with printing the joint appendix filed.

Aug 3 1999 Order extending time to file brief of appellant on the merits until August 24, 1999.

Aug 5 1999 Brief amici curiae of Family Research Council, et al. filed.

Aug 24 1999 Brief of appellants United States, et al. (TBP) filed.

Aug 26 1999 Record filed.

Aug 27 1999 Lodging by the Solicitor General (2 copies of each of the 5 video tapes/exhibits).

Sep 2 1999 Record filed.

Sep 7 1999 Record filed.

Sep 10 1999 Motion of Solicitor General to dispense with printing the joint appendix GRANTED.

Sep 13 1999 Letter from the Solicitor General including district court material received and distributed.

Sep 24 1999 Brief amici curiae of Sexuality Scholars, Researchers, Educators and Therapists filed.

Sep 24 1999 Brief amicus curiae of Thomas Jefferson Center for Protection of Free Expression filed.

Sep 24 1999 Brief amicus curiae of National Cable Television Association filed.

Sep 24 1999 Brief amicus curiae of Media Institute filed.

Sep 24 1999 Brief amici curiae of American Booksellers Foundation for Free Expression, et al. filed.

Sep 24 1999 Brief of appellee Playboy Entertainment Group, Inc. filed.

Sep 24 1999 Letter from counsel for Respondent Received Distributed CIRCULATED.

Oct 6 1999

Oct 26 1999 Application (99A342) petitioners' reply brief on the merits extended to November 3, 1999., submitted to Justice Souter.

Oct 26 1999 Application (99A342) granted by Justice Souter extending the time to file until November 3, 1999.

Entry	Date	Proceedings and Orders
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Nov 3 1999	Reply brief of appellant United States, et al. filed.
Nov 30 1999	ARGUED.

981682 APR 19 1999

No.

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

PLAYBOY ENTERTAINMENT GROUP, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, Tit. V, 110 Stat. 136, requires that a cable television operator "providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming" either "fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber * * * does not receive it," or, alternatively, not provide that programming "during the hours of the day (as determined by the [Federal Communication] Commission) when a significant number of children are likely to view it."

The questions presented are:

1. Whether Section 505 violates the First Amendment.
2. Whether the three-judge district court was divested of jurisdiction to dispose of the government's post-judgment motions under Rules 59(e) and 60(a) of the Federal Rules of Civil Procedure by the government's filing of a notice of appeal while those motions were pending.

II

PARTIES TO THE PROCEEDINGS

Appellants are the United States of America, Janet Reno, Attorney General, the United States Department of Justice, and the Federal Communications Commission. Appellee is Playboy Entertainment Group, Inc. Spice Entertainment Companies, Inc. (formerly Graff Pay-Per-View), was a party below but, after failing to obtain a preliminary injunction, chose not to participate in litigation of the merits. Spice has since been purchased by Playboy.

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PLAYBOY ENTERTAINMENT GROUP, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court (App., *infra*, 1a-39a) is reported at 30 F. Supp. 2d 702. The permanent injunction (App., *infra*, 87a-88a) and the order denying the government's post-trial motions (App., *infra*, 91a-92a) are unreported. The opinion of the district court denying a preliminary injunction (App., *infra*, 40a-86a) is reported at 918 F. Supp. 772. The opinion of the district court granting a temporary restraining order is reported at 918 F. Supp. 813. The order of this Court affirming the denial of a preliminary injunction is reported at 520 U.S. 1141.

JURISDICTION

The permanent injunction of the three-judge district court, dated December 29 1998, was entered on December 30, 1998. The government filed a notice of appeal on January 19, 1999 (a Tuesday after a Monday holiday). On March 10, 1999, Justice Souter extended the time for filing a jurisdictional statement to and including April 19, 1999. On March

18, 1999, the district court entered an order dismissing the government's motions to alter or amend the judgment and to correct the judgment. On April 7, 1999, the government filed a second notice of appeal, from both the original injunction and the order dismissing the government's post-trial motions. The jurisdiction of this Court rests on Section 561(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 143, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." Sections 504, 505, and 561 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, 142, are reproduced at App., *infra*, 96a-101a.

STATEMENT

This action arises out of Congress's efforts to address the problem of "signal bleed" of cable television channels that are devoted to sexually explicit, "adult" programming. Signal bleed is a phenomenon occurring in most cable television systems. It is associated with the practice of cable television operators of "scrambling" or otherwise blocking the signal for their "premium" channels (channels for which an additional charge is imposed) to ensure that cable customers who have not subscribed to those channels do not receive programming for which they have not paid. Signal bleed occurs when non-subscribers receive a signal that is only partially scrambled: the video signal can be discerned at random intervals, and the audio signal is often not scrambled at all.

1. Approximately 62 million households nationwide receive cable television. App., *infra*, 53a. Cable customers typically are offered a "basic" package of channels for a monthly fee, but they also may subscribe at an additional monthly fee to premium channels that provide sports

programming, recently released movies, or adult, sexually explicit entertainment. *Id.* at 5a. Cable customers may also order premium programming on a pay-per-view basis, permitting the customer access to a particular movie or sporting event for a specified additional fee. *Ibid.*

To ensure that cable customers who have not paid for premium programming are not able to view it, most cable operators scramble the programming at their central transmission facility using either "RF" or "baseband" technology. RF scrambling causes the picture to jump and roll on the television sets of customers who are not authorized to receive the premium channel, although the images on the screen can at times be discerned. The cable system provides customers who are authorized to receive the premium channel with a set-top device, called a converter, which is connected between the subscriber line and the television set to counteract the scrambling and permit clear reception of the channel. RF scrambling does not affect the audio portion of the signal, and, as a result, the scrambling does not prevent the audio portion from being heard clearly on all customers' television sets at all times. App., *infra*, 7a.

Modern baseband scrambling, in contrast, renders the video portion of the signal unintelligible. As with RF scrambling, subscribers authorized to receive the programming are given converters to permit clear reception. Some baseband scrambling systems also encrypt the audio portion of the signal, so that no intelligible audio is presented to customers who do not subscribe to the scrambled premium service. For the most part, however, cable operators use RF scrambling, or prior generations of baseband scrambling, which do not render the video completely unintelligible and do not scramble the audio at all. App., *infra*, 7a-8a.

The limitations of these scrambling systems give rise to the "signal bleed" problem. In any system where premium

programming is carried, all customers of the system receive the scrambled signal on all televisions hooked up to the customer's line. As a result, all customers who are non-subscribers to a premium service typically receive a partially scrambled video signal and a completely clear audio signal. App., *infra*, 9a.

2. Congress enacted the statutory provision at issue in this case, Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, to address the problem of signal bleed in the context of cable channels that are devoted to sexually explicit, "adult" programming. Congress was "aware that some cable systems [were] permitting 'adult' programs that [were] clearly unsuitable for children to be received in the home without sufficient scrambling." S. Rep. No. 367, 103d Cong., 2d Sess. 103 (1994). Senator Feinstein, one of the sponsors of Section 505, explained that "[p]arents * * * come home after work only to find their children * * * watching or listening to the adults-only channel, a channel that many parents did not even know existed." 141 Cong. Rec. S8167 (daily ed. June 12, 1995). As an example, she referred to the fact that a "partially scrambled pornography signal was broadcast only one channel away from a network broadcasting cartoons and was easily accessible for children to view." *Ibid.*

Congress's concerns were triggered by complaints from across the country. For example, Mr. Anthony Snesko had made 550 copies of a videotape showing the Spice Channel as it appeared on his television in Poway, California, at 9:00 in the morning sometime in April or May, 1994, and had distributed a copy to every Member of the House and Senate. DX 1, 47.¹ In December 1995, a mother from Cape Coral,

¹ The videotape shows a scene in which a man performs oral sex on a woman. The video images, while scrambled, are discernible. The entirely

Florida, complained to her Representative that she had recently found her eight-year-old son, seven-year-old daughter, and a playmate watching Spice at 4:00 in the afternoon, "transfixed" by scenes of "a naked man sodomizing a woman" together with the "groans and epithets that go along." DX 55. In 1993, Senator Biden urged the Federal Communications Commission to review a cable company's compliance with federal law after large numbers of Delaware residents voiced objections about unwanted reception of Spice. DX 72. See also DX 59, 61, 70 (constituent letters complaining about inadequately scrambled "sex channels" and their availability to children).

In her floor statement, Senator Feinstein acknowledged that it was also open to Congress to require cable operators to provide complete blocking of audio and video signals free of charge on *any* channel—not merely those showing sexually explicit programming—at the request of a subscriber. That is the approach Congress ultimately included in Section 504 of the Telecommunications Act of 1996, 110 Stat. 136. But Senator Feinstein explained that the proposal for blocking on demand did not "go[] far enough," because it would "put the burden of action on the subscriber * * * by requiring a subscriber to specifically request the blocking of indecent programming." 141 Cong. Rec. at S8167.

3. Section 505 became law on February 8, 1996, when the President signed the Telecommunications Act of 1996, 110 Stat. 56. Under Section 505, "[i]n providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor"—a term that includes a cable operator—"shall fully scramble or otherwise fully block the video and audio

audible audio portion contains four-letter words and vulgar references to sexual organs. DX 1.

portion of such channel so that one not a subscriber to such channel or programming does not receive it." 110 Stat. 136 (codified at 47 U.S.C. 561 (Supp. II 1996)). Until the cable operator complies with those requirements, it "shall limit the access of children" to such programming "by not providing such programming during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it." *Ibid.*

On March 5, 1996, the Federal Communications Commission issued an interim rule for implementation of Section 505. Order and Notice of Proposed Rulemaking, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C.R. 5386 (*Implementation of Section 505*). First, the Commission interpreted the term "sexually explicit adult programming," as used in Section 505, to be a category of "programming that is indecent," a phrase also used in the statute. *Implementation of Section 505* ¶¶ 6, 9. The Commission defined "indecent programming" on an interim basis to mean "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium," and proposed to adopt that definition on a permanent basis. *Id.* ¶ 9. As the Commission explained, that is essentially the same definition adopted by the Commission for purposes of regulating indecent broadcast programs and telephone messages.

The Commission also proposed, and provisionally adopted, a safe harbor for purposes of Section 505's time-channeling requirement of 10 p.m. to 6 a.m., the same safe-harbor hours previously established for airing indecent broadcast television or radio programs. *Implementation of Section 505* ¶¶ 5, 8; see also 47 C.F.R. 73.3999. The final rules implementing Section 505 became effective on May 18, 1997. *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 12 F.C.C.R. 5212 (Apr. 17, 1997).

4. Appellee Playboy Entertainment Group provides "virtually 100% sexually explicit adult programming," App., *infra*, 5a-6a, for transmission by cable operators to premium subscribers who choose to order Playboy's programming. Playboy provides such programming via its Playboy Television and AdultTVision networks. *Id.* at 5a. On February 26, 1996, Playboy filed suit in the United States District Court for the District of Delaware seeking declaratory and injunctive relief against the operation of Section 505. The complaint alleged that Section 505 violated Playboy's rights under the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The district court consolidated the action with a similar action brought by Spice Entertainment Companies (formerly known as Graff Pay-Per-View), which operated channels similar to those operated by Playboy.² A three-judge court was convened pursuant to Section 561 of the Telecommunications Act, 110 Stat. 142, 47 U.S.C. 223 note (Supp. II 1996).

On November 8, 1996, the three-judge court issued a decision denying Playboy's motion for a preliminary injunction, stating that Playboy and Spice "ha[d] not persuaded us that they are likely to prevail on the merits." App., *infra*, 63a.³ Reviewing Section 505 under "strict scrutiny or something very close to strict scrutiny" as a content-based restriction on speech, *id.* at 67a, the court held that Section 505 is carefully tailored to further the compelling interest in protecting children. The court explained that Section 505 "does

² It appears that Playboy has recently purchased Spice, which did not participate in the proceedings on remand from this Court and is no longer a party to this case. Chicago Tribune, Mar. 16, 1999, 1999 WL 2853823.

³ Judge Farnan had entered a temporary restraining order on March 7, 1996, at the outset of this case, which remained in effect until this Court summarily affirmed the district court's denial of a preliminary injunction. 918 F. Supp. 813 (D. Del. 1996); see App., *infra*, 2a, 19a.

not seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing erotic material on premium cable networks if they so desire.” *Id.* at 78a. Instead, the court explained, Section 505 permits cable operators to provide sexually explicit programming to willing subscribers if the operators avail themselves of either of two remedies to protect nonsubscribers—full scrambling of audio and video or time-channeling. *Id.* at 76a.

5. Playboy appealed the denial of its request for a preliminary injunction directly to this Court, which summarily affirmed. 520 U.S. 1141 (1997).

6. The case was tried before the district court on March 4-6, 1998. On December 28, 1998, the district court issued a decision holding that Section 505 is unconstitutional under the First Amendment.

The court held, as it had at the preliminary injunction stage, that “either strict scrutiny or something very close to strict scrutiny,” should be applied. App., *infra*, 23a. The court also held that Section 505 is constitutional only if the government proves that it “is a ‘least restrictive alternative,’ i.e., that no less restrictive measures are available to achieve the same ends the government seeks to achieve.” *Id.* at 26a.

The court noted that the government asserted three compelling interests supporting Section 505: “the Government’s interest in the well-being of the nation’s youth—the need to protect children from exposure to patently offensive sex-related material”; “the Government’s interest in supporting parental claims of authority in their own household—the need to protect parents’ right to inculcate morals and beliefs on their children”; and “the Government’s interest in ensuring the individual’s right to be left alone in the privacy of his or her home—the need to protect households from unwanted communications.” App., *infra*, 26a-27a. Although it expressed some doubt about the strength of the empirical evidence in the record regarding harm to minors, see *id.* at

30a, the court held that all three of those interests are present and, in sum, are compelling. *Id.* at 32a.

The court held, however, that Section 505 is not the least restrictive alternative that the government could have adopted to advance those interests. App., *infra*, 35a. The court noted that Section 505 requires complete scrambling of the video signal even to households without children, and the court concluded that Section 505’s alternative of time channeling restricts “a significant amount of protected speech,” because “30-50% of all adult programming is viewed by households prior to 10 p.m.” *Id.* at 33a. In the court’s view, Section 504, by contrast, is a content-neutral provision that permits subscribers voluntarily to request a free blocking device, thus avoiding the need for full scrambling or time channeling. *Id.* at 34a-35a.

The court acknowledged that an alternative must be not only less restrictive but also “a viable alternative.” App., *infra*, 35a. In this respect, the court acknowledged that under Section 504 “parents usually become aware of the problem only after the child has been exposed to signal bleed, and then the damage has been done,” and that even if parents are aware of the problem, “the success of § 504 depends on parental awareness that they have the right to receive a lockbox free of charge.” *Ibid.* The court was unable to find that the experience during the 14-month period in which Section 504 was in effect but Section 505 was enjoined (see note 3, *supra*) was sufficient to alleviate the court’s concerns regarding the adequacy of notice to customers under Section 504. Specifically, notwithstanding the applicability of Section 504 during that time, cable operators still had distributed blocking devices on request to fewer than one-half of one percent of subscribers.⁴ The court

⁴ This period began on March 9, 1996, when the Telecommunications Act went into effect, and ended on May 18, 1997, when Section 505 was

stated, however, that the "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." *Id.* at 36a. In the court's view, then, either there has not been "adequate notice to subscribers" or "[p]arents may have little concern that the adult channels be blocked." *Ibid.*

The court set forth in some detail what would constitute "adequate notice" under Section 504. First, the court explained, it should include a basic notice to subscribers that children may be viewing signal bleed from sexually explicit programming and that blocking devices are readily available free of charge. App., *infra*, 36a-37a. Next, the court stated that such notice would have to be provided by "[a]ppropriate means," including "inserts in monthly billing statements," "on-air advertisement on channels other than the one broadcasting the sexually explicit programming," and "a special notice" when a cable operator "change[s] the channel on which it broadcasts sexually explicit programming." *Id.* at 37a. The cable operator would have to provide the means whereby "a request for a free device to block the offending channel can be made by a telephone call" to the cable operator. *Ibid.* Finally, the notice should be given "on a regular basis, at reasonable intervals" and whenever a cable operator "change[s] the channel on which it broadcasts sexually explicit programming." *Ibid.*

The court held that when enhanced with such "adequate notice," Section 504 would be "a less restrictive alternative to § 505." App., *infra*, 38a. The court explained that "with adequate notice of the issue of signal bleed, parents can decide for themselves whether it is a problem," and "to any parent for whom signal bleed is a concern, § 504, along with

implemented after the denial of a preliminary injunction was affirmed by this Court. App., *infra*, 19a.

'adequate notice,' is an effective solution." *Id.* at 37a-38a. The court recognized that it could not require cable operators to provide "adequate notice," because as non-parties the operators were not subject to the court's jurisdiction. But the court pointed out that it did have jurisdiction over Playboy, and declared that it would require Playboy to include notice provisions in its contractual arrangements with cable operators. The district court then reiterated that unless adequate notice is provided, Section 504 would not be a viable alternative to Section 505. *Id.* at 38a.

7. On December 29, 1998, the day after announcing its decision, the court issued an order permanently enjoining enforcement of Section 505. App., *infra*, 87a-88a. The order did not contain any requirement that Playboy include "adequate notice" provisions in its contracts with cable operators. Nor did it limit the scope of the injunction to Playboy, which is the only programmer of sexually explicit broadcasting that remains a party to this lawsuit.

On January 12, 1999, the government filed a motion under Rule 59(e) of the Federal Rules of Civil Procedure seeking to alter or amend the judgment to limit the injunction to Playboy, and it filed a motion under Rule 60(a) seeking to correct the judgment by including the requirement mentioned in the court's opinion—that Playboy ensure that its contracts require cable operators to provide "adequate notice" to cable customers. The government then filed a notice of appeal on January 19, 1999, 20 days after entry of the injunction, as provided in Section 561(b), 110 Stat. 143, of the Act. App., *infra*, 89a-90a; see page 1, *supra*.

On March 18, 1999, the district court dismissed the government's two motions, stating that it "lack[ed] jurisdiction to adjudicate these motions due to subsequent filing of Defendants' notice of appeal to the United States Supreme Court." App., *infra*, 91a-92a. On April 7, 1999, the govern-

ment filed a second notice of appeal, addressed to both the original injunction and the March 18 order. *Id.* at 93a-95a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The three-judge district court has held Section 505 of the Telecommunications Act of 1996 unconstitutional and enjoined its application throughout the country. The court based that holding solely on its conclusion that a hypothetical statute similar to Section 504 of the Act, but with complex, enhanced notice requirements, would be a less restrictive alternative to Section 505. The court's analysis was deeply flawed, and its judgment invalidating an Act of Congress warrants plenary review by this Court.

First, the court applied the strictest form of scrutiny, ruling that Section 505 could survive only if it were less restrictive than any alternative, including the court's untried theoretical construct of a Section 504-type regulation enhanced by an extensive but imprecise notice requirement. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 755 (1996), the plurality reserved the question whether strict scrutiny applies to regulation of indecency on cable television. The district court here decided that question and did so incorrectly, thus subjecting indecent programming distributed by cable to a different First Amendment standard than identical material broadcast through the air. Had it not done so, the court would have concluded that Section 505 is constitutional.

Second, the district court's ruling is illogical even on its own terms, because it has not been established that even the enhanced version of Section 504 that the court hypothesized would in practice be less restrictive than Section 505, and it would not in any event protect the compelling interests that the court itself recognized. Based on the court's own findings, if any significant number of subscribers opted to request blocking of signal bleed, economics would lead to the

means of compliance that the district court found to have resulted under Section 505—cable operators would time channel sexually explicit programming services or simply drop them altogether. In addition, in analyzing whether its hypothetical enhanced Section 504-type regulation would adequately serve the interests protected by Section 505, the court entirely ignored society's independent interest in protecting minors from exposure to explicit sexual material. Had the court taken that interest into account, it would have found any version of Section 504 to be an inadequate alternative.

A. 1. As a general matter, "[t]he government may * * * regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989). This Court has never applied that "strict scrutiny" standard, however, to the regulation of indecency on radio or television. Instead, in *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), the Court stated that "special treatment of indecent broadcasting" is "amply justified" and upheld a time-channeling regulation of indecency on broadcast radio that would have been constitutionally infirm in many other contexts. See *ibid.* The Court explained that among the justifications for such "special treatment" are the facts that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans"; that indecency on television or radio "confronts the citizen * * * in the privacy of the home"; that "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content"; and that "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 748-749.

The Court has repeatedly reaffirmed the principles of *Pacifica*. For example, in *Sable*, the Court noted that *Pacifica*'s "special treatment of indecent broadcasting" is justified because the regulation at issue there "did not involve a total ban on broadcasting indecent material," but instead "sought to channel it to times of day when children most likely would not be exposed to it." 492 U.S. at 127. In addition, the Court pointed out that *Pacifica* "relied on the 'unique' attributes of broadcasting, noting that broadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children, even those too young to read.'" *Ibid.* (quoting *Pacifica*, 438 U.S. at 733). More recently, in *Reno v. ACLU*, 521 U.S. 844 (1997), the Court held that "the most stringent review" applies to regulation of indecency on the Internet, but it reaffirmed that "special treatment of indecent broadcasting" by means of non-criminal regulation is appropriate, essentially for the reasons given above, *id.* at 866-868.

2. The Court has not yet definitively decided whether the more relaxed standard that applies to time-channeling regulation of indecency on broadcast radio and television also applies to regulation of indecency on cable television. In *Denver Area*, the plurality stated that it "need [not] determine whether, or the extent to which, *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue" in a challenge to regulations of cable television. 518 U.S. at 755. But the plurality in *Denver Area* also relied heavily on *Pacifica* to uphold one of the cable television regulations at issue there. *Id.* at 744-748. Moreover, it distinguished *Sable*, in which the Court held unconstitutional a ban on indecent telephone messages, on the ground that *Sable*, unlike *Denver Area*, involved "a total governmentally imposed ban on a category of communications, but also involved a communications medium, telephone

service, that was significantly less likely to expose children to the banned material, was less intrusive, and allowed for significantly more control over what comes into the home than either broadcasting or the cable transmission system before us." *Id.* at 748. The plurality concluded that, with respect to the way in which "parents and children view television programming, and how pervasive and intrusive that programming is[,] * * * cable and broadcast television differ little, if at all." *Ibid.*

As the plurality noted in *Denver Area*, the factors on which the Court based its decision to apply "special treatment" to time-channeling of indecent over-the-air radio and television programming apply with at least equal force to indecent cable television programming. See 518 U.S. at 744-745, 748. Children may just as easily obtain access to indecency broadcast on cable television as to similar materials on broadcast channels. Moreover, the regulation at issue in this case, like the regulation at issue in *Pacifica*, is not a criminal prohibition or an outright ban on indecent speech; it permits cable operators to "time channel" indecent material to the same late-night hours as in *Pacifica*, and it also permits operators to provide indecent material at any time, so long as they eliminate unwanted signal bleed. Finally, as in *Pacifica*, "warnings could not adequately protect the listener from unexpected [signal bleed]." *Reno*, 521 U.S. at 867.

3. The district court in this case gave no weight to the concerns on which the Court relied in sustaining special treatment of regulation of broadcast indecency in each of the above cases. The district court did note that "the context of [Section 505's] content-based restriction must * * * be considered," because "[c]able television is a means of communication that is both pervasive and to which children are easily exposed." App., *infra*, 26a. But the court proceeded to attach essentially no significance to that "context" in

holding that "[t]he Government must prove that * * * no less restrictive measures are available to achieve the same ends the government seeks to achieve." *Ibid.* Indeed, the court applied its "least restrictive alternative" test in a particularly rigorous manner, holding that Section 505 was unconstitutional solely because the court could imagine an alternative, entirely hypothetical scheme whose practicality, cost, and legality have never been tested.

Whether a scheme of adequate notice could be devised without resulting in exorbitant costs or raising other legal problems is open to substantial doubt. In this regard, it is significant that the district court's scheme, though modeled on Section 504, would be far more complex and uncertain. It would involve requirements, enforceable only against Playboy that operators (who have a financial incentive to minimize subscriber requests for blocking devices) notify customers at regular (though unspecified) intervals, and via a variety of means, of the problem of signal bleed, the availability of blocking devices at no charge, and even the means—"a telephone call" to the cable operator, App., *infra*, 37a—by which a subscriber could obtain the devices. Indeed, the court held such a scheme to be a "viable" alternative to Section 505 notwithstanding the fact that there was literally *no* evidence in the record that such a scheme would work to provide genuinely adequate notice and a genuinely free choice. The only evidence that was in the record on this point surely did not support the viability of the court's scheme, for it consisted of the meager one-half of one percent rate of requests for blocking devices (albeit without the detailed notice and other requirements fashioned by the district court).

Pacifica upheld a time-channeling regulation of broadcast indecency that was more restrictive than the Section 505 scheme. It did not offer broadcasters the alternative of

blocking rather than time-channeling,⁵ and it directly regulated a desired communication, rather than, as here, regulating a byproduct (signal bleed) of a communication between other parties in which the receiving nonsubscriber has no legitimate interest. Indeed, because the interest in protection of children in this case is greater than that in *Pacifica*, it would support stronger measures. Unlike the one-time broadcast of inappropriate language at issue in *Pacifica*, this case involves channels that carry "virtually 100% sexually explicit adult programming," App., *infra*, 42a, 47a, and which result, due to signal bleed, in "an unbroken continuum of sexually explicit sounds and images, delivered without invitation to [children's] home[s]." *Id.* at 73a. Had the district court taken *Pacifica* and its rationale into account, it would have upheld Section 505 because Section 505 imposes a very limited restriction on speech and is a very effective approach to the substantial evil it addresses. The court's application instead of a very rigorous, least-restrictive-alternative test is consistent only with a form of scrutiny far more demanding than that which this Court has applied to indecency on the broadcast media. Because indecency on cable television is constitutionally indistinguishable from indecency on those media, the district court's use of that standard of review was erroneous.

B. The district court also erred in concluding, even under the exceptionally strict standard of review it applied in this case, that Section 504 would be less restrictive than Section

⁵ Although the district court found that cable operators "with incomplete scrambling technology" choose time-channeling, App., *infra*, 33a n.23, an increasing number of cable systems use digital or other technologies that eliminate signal bleed entirely. See *id.* at 9a, 18a n.17. With respect to subscribers to sexually explicit programming services on such systems, Section 505 imposes no restriction on speech whatever. Quite aside from the arguments in text, the district court had no basis for enjoining the application of Section 505 to such systems.

505 or that Section 504 would be sufficient to promote the interests underlying Section 505.

1. The court's analysis of the restrictions imposed by Section 505 was based on its finding that "time channeling has proven to be the method of compliance of choice among" cable operators, because "no other system-wide blocking technique is economically feasible," App., *infra*, 33a & n.23. See also *id.* at 16a-17a. In turn, the court reasoned, such time channeling "amounts to the removal of all sexually explicit programming at issue during two thirds of the broadcast day from all households on a cable system." *Id.* at 33a. Time channeling thus "diminishes Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech." *Ibid.*⁶

Based on the court's own factual findings, it is highly likely that an application of the court's hypothetical, enhanced version of Section 504 would have at least the same effects. The court found that "the distribution of lockboxes to a sufficient number of customers to effectively control the problem of signal bleed is not economically feasible." App., *infra*, 21a. Specifically, the court found that, "[i]f one considers a five year revenue stream in the break-even analysis, the number of traps that could be distributed rises to 6.0 percent of the subscriber base." *Id.* at 22a. In other words, if six percent of a system's subscribers opted to block signal bleed under an enhanced version of Section 504, then the costs of supplying the traps would equal the operator's expected profit from carrying sexually explicit channels. Of

⁶ We do not dispute that time-channeling of indecent sexually explicit television programming to the hours when most viewers want to see such programming is a restriction on such programming. The district court, however, failed to take into account the rather modest scope of that restriction—especially in light of the easy availability of VCR machines to tape television programming and play it at a time that is convenient to the viewer. Cf. *Pacifica*, 438 U.S. at 750 & n.28.

course, cable operators could be expected to cease carrying sexually explicit channels long before they reached that break-even point. As the court found, "profit-maximizing cable operators would cease carriage of adult channels * * * if costs rose to such a point that the profit from adult channels was less than the profit from channels unlikely to require blocking." *Ibid.*

Those findings make clear that any scheme that resulted in requests for traps from even quite a small number of customers—fewer than six percent and perhaps as low as one to three percent—would make it uneconomical for cable operators to carry sexually explicit channels. The district court's enhanced version of Section 504 would, under its own rationale, be such a scheme. The district court designed its enhanced version of Section 504 to provide genuine, easily understandable notice to each subscriber of the problem of signal bleed and a quick and easy means to stop it. App., *infra*, 36a-37a. Moreover, such notice would have to be repeated on a regular basis (though the district court did not specify how often), and special notice would have to be given whenever a cable operator changed the channel on which a sexually explicit programming service was carried. *Id.* at 37a. If such a system of notice and easily available blocking were in fact put into effect, the number of subscribers requesting blocking could be expected to exceed the minimal number necessary to make carriage of the sexually explicit channels uneconomical.

The result is that even a much enhanced version of Section 504 would likely lead to at least the same restriction of speech as does Section 505. Indeed, because time-channeling is not a part of the enhanced Section 504 scheme as envisioned by the district court, operators would simply cease to offer Playboy's sexually explicit programming services. On the other hand, if time-channeling too were offered to cable operators as a part of the hypothetical enhanced

Section 504 package, then the operators would surely choose that option, for precisely the same economic reasons as they have chosen time channeling to comply with Section 505. Accordingly, the district court's enhanced version of Section 504 would be at least as restrictive of speech as Section 505, and it therefore is not a "less restrictive alternative." At the very least, the proposition that a fully effective notice requirement of the sort the district court posited would *not* result in time channeling to a comparable extent has not been demonstrated with the clarity necessary to invalidate an Act of Congress on least-restrictive-means grounds.

2. The district court's hypothetical, enhanced version of Section 504 would not in any event be a satisfactory alternative to Section 505, because it would not adequately protect the compelling interests that the district court itself recognized supported Section 505. Those interests are:

- 1) the Government's interest in the well-being of the nation's youth—the need to protect children from exposure to patently offensive sex-related material; 2) the Government's interest in supporting parental claims of authority in their own household—the need to protect parents' right to inculcate morals and beliefs [i]n their children; and 3) the Government's interest in ensuring the individual's right to be left alone in the privacy of his or her home—the need to protect households from unwanted communications.

App., *infra*, 26a-27a. See *id.* at 32a (concluding, after discussing each of the above interests, "that § 505 addresses three interests which in sum can be labeled 'compelling'").⁷

⁷ Although the district court ultimately accepted that sufficient evidence had been introduced to establish each of the interests, it noted that it was "troubled by the absence of evidence of harm presented both before Congress and before [the court] that the viewing of signal bleed of sexually explicit programming causes harm to children." App., *infra*, 30a.

This Court has carefully distinguished between the first and second of those interests in the past, referring in *Reno v. ACLU*, both to "the State's *independent* interest in the well-being of its youth," as well as "the principle that 'the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.'" 521 U.S. at 865 (emphasis added) (quoting *Gins-*

The district court's concern was misplaced. The government need not introduce empirical evidence in each case that minors are harmed by exposure to indecent, sexually explicit material. Concerns about minors' exposure to such material are based on commonly held moral views about the upbringing of children as well as empirical, scientific evidence. This Court has repeatedly held, over a period of many years and without referring to specific sociological or psychological data demonstrating harm, that society has a compelling interest in protecting children from exposure to indecent, sexually explicit materials. See, e.g., *Reno v. ACLU*, 521 U.S. at 869 ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors' which extend[s] to shielding them from indecent messages that are not obscene by adult standards.") (quoting *Sable*, 492 U.S. at 126); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683-684 (1986); *New York v. Ferber*, 458 U.S. 747, 756-757 (1982); *Ginsberg v. New York*, 390 U.S. 629, 640-642 (1968). In the *Denver Area* case, the Court's unanimity on this point was particularly striking. See 518 U.S. at 743 (plurality opinion) ("[T]he provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material."); *id.* at 779 (O'Connor, J., concurring in part and dissenting in part) (Regulations at issue "serve an important governmental interest: the well-established compelling interest of protecting children from exposure to indecent material."); *id.* at 806 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Congress does have * * * a compelling interest in protecting children from indecent speech."); *id.* at 832 (Thomas, J., concurring in the judgment in part and dissenting in part) ("Congress has a 'compelling interest in protecting the physical and psychological well-being of minors' and * * * its interest 'extends to shielding minors from the influence of [indecent speech] that is not obscene by adult standards.'").

berg v. New York, 390 U.S. 629, 639 (1968)). Our society has long recognized the authority of parents to decide how to raise their children. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). But it has also long been recognized that society itself has an interest in the upbringing of youth, especially where parents, as a result of inertia or indifference or the competing claims of other responsibilities, fail to exercise their own authority.

In determining whether its hypothetical, enhanced version of Section 504 would provide a less restrictive alternative to Section 505, the court entirely ignored society's independent interest in seeing to it that children are not exposed to sexually explicit materials. The district court stated:

[W]ith adequate notice of the issue of signal bleed, parents can decide for themselves whether it is a problem. Thus to any parent for whom signal bleed is a concern, § 504, along with 'adequate notice,' is an effective solution. In reality, § 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights.

App., *infra*, 37a-38a. We assume for purposes of discussion here that the court was correct in concluding that its enhanced version of Section 504 would be sufficient to inform parents of the problem of signal bleed and to permit them to eliminate it easily and effectively. In that event, such a regulation would arguably serve two of the interests identified by the district court—the interests in “protect[ing] parents’ right to inculcate morals and beliefs [i]n their children” and “ensuring the individual’s right to be left alone in the privacy of his or her home.” *Id.* at 26a. Under such an enhanced version of Section 504, parents who had strong feelings about the matter could certainly see to it that their

children did not view signal bleed—at least in their own homes.

The district court's enhanced version of Section 504 would not, however, serve society's independent interest in protecting minors from exposure to indecent, sexually explicit materials, and the district court's reasoning takes no account of that interest. Even an enhanced version of Section 504 would succeed in blocking signal bleed only if parents affirmatively decided to avail themselves of the means offered them to do so. There would certainly be parents—perhaps a large number of parents—who out of inertia, indifference, or distraction, simply would take no action to block signal bleed, even if fully informed of the problem and even if offered a relatively easy solution.⁸ There also are

⁸ Studies have confirmed that sales of a good or service will be higher if consumers are required to take action to refuse it than if a mere failure to act is a refusal of the good or service. For example, telephone companies offering an “optional maintenance plan” for wires inside the subscriber's residence achieved a median subscription rate of 44% among 50 positive option offers (the subscriber must affirmatively request the plan) and a median rate of 80.5% among 22 unilateral negative option offers. Similarly, Canadian cable programmers have reported that such “negative option” offers for new channels resulted in 60%-70% subscription rates, far higher than the 25% rates resulting from standard (positive option) marketing methods. See Dennis D. Lamont, *Negative Option Offers in Consumer Service Contracts: A Principled Reconciliation of Commerce and Consumer Protection*, 42 UCLA L. Rev. 1315, 1330-1332 (1995). See also *In re Columbia Broadcasting System, Inc.*, 72 F.T.C. 27, 337-338 (1967) (FTC action against record club) (“In practice, the Club's officials anticipate in advance that approximately 35% of the members of its largest (‘popular’) division will not return the card and hence will receive and accept the record selected for them by the Club.”). Indeed, precisely because negative option sales give an unfair advantage to the provider of a good or service, Congress expressly prohibited cable operators from using negative option billing. See 47 U.S.C. 543(f) (“A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name,” and the subscriber's “failure to

children who would view signal bleed at the homes of friends whose parents do not act (for whatever reason) under an enhanced Section 504 to block signal bleed. See App., *infra*, 52a, 80a. Society has an interest independent of the choices made by parents in seeing to it that children are not exposed to sexually explicit materials. Section 505 protects that interest, by ensuring that children are not exposed to signal bleed as a result of inertia, indifference, or distraction; reliance on Section 504 alone, by contrast, would disserve that interest, since children would be exposed to signal bleed of sexually explicit materials if parents did not take affirmative steps to obtain blocking.

We are not referring here to that presumably very small number of children whose parents affirmatively want their children to have the opportunity to watch sexually explicit programming. Even if we assume, *arguendo*, that the interests of those parents should prevail over the interests of society in protecting children from indecent material (cf. *Reno v. ACLU*, 521 U.S. at 878 (reserving that question)), such parents' interests would be protected equally well either by Section 505 (under which they would obtain access to sexually explicit channels by subscribing to it⁹) or by a hypothetical enhanced Section 504 (under which they would automatically receive the signal bleed). The children of parents who fail to act as a result of inertia, indifference, or

refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment."); 47 C.F.R. 76.981 (FCC regulation prohibiting negative option billing). See also 16 C.F.R. 425.1 (FTC regulation regarding negative option plans).

⁹ We leave out of the analysis altogether those parents or other individuals who want signal bleed because they would like to receive sexually explicit materials broadcast by Playboy but do not want to pay for it. Such individuals have no cognizable interest in receiving signal bleed of a channel to which they do not subscribe.

distraction, however, would be protected only by Section 505. The district court gave no weight whatsoever to society's interest in protecting those children when it ruled that a hypothetical enhanced version of Section 504 would be an adequate alternative to Section 505. Accordingly, the district court's conclusion that such a version of Section 504 would be a less restrictive alternative to Section 505 is mistaken, and its judgment that Section 505 is unconstitutional should be reversed for that reason as well.

C. The district court's dismissal of the government's post-trial motions also was mistaken. The first notice of appeal, filed within the 20-day period prescribed by Section 561(b) of the Act but after the post-trial motions were filed, was effective to challenge the court's final judgment (as it would not have been if Rule 4(a)(4) of the Federal Rules of Appellate Procedure applied), but it did not deprive the district court of jurisdiction to consider the government's motions relating to the terms of that judgment.

1. In an appeal to a court of appeals, the filing of a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) or the filing (not more than 10 days after entry of judgment) of a motion for relief under Federal Rule of Civil Procedure 60(b) tolls the time within which the notice of appeal must be filed. Fed. R. App. P. 4(a)(4)(A)(iv) and (vi). A notice of appeal filed before disposition of such a motion becomes effective only when the order disposing of the last such motion is entered. Fed. R. App. P. 4(a)(4)(B)(i). The reason for this rule is that when such a motion is filed, "the case lacks finality." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2821, at 220 (2d ed. 1995).

This Court's rule governing certiorari (Sup. Ct. R. 13.3) is similar to Rule 4(a)(4) in that it provides for tolling of the time for filing a certiorari petition while a petition for rehearing is pending in the court of appeals, but the Court's rule governing appeals (Sup. Ct. R. 18) does not address the

consequences of filing a Rule 59(e) or 60(a) motion in the district court. The time limits for filing a notice of appeal in such a case are "not free from doubt * * * because Rule 18.1 does not contain the statement, in former appeal Rule 11.3 (and in current certiorari Rule 13.4), that 'if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties * * * runs from the date of the denial of rehearing or the entry of a subsequent judgment.'" Robert L. Stern et al, *Supreme Court Practice* § 7.2(c) at 388 (7th ed. 1993). See also *ibid.* (noting that it is "most unlikely" that this Court meant to abandon that rule *sub silentio*). Based on simple caution in this uncertain area of the law, we therefore decided to file a notice of appeal within 20 days of entry of the injunction.¹⁰

2. Our filing of the first notice of appeal while the two post-trial motions were pending before the district court did not deprive the district court of jurisdiction to consider those motions. To begin with, Rule 60(a) itself permits a district court to correct clerical mistakes in a judgment while an appeal is pending: "During the pendency of an appeal, such

¹⁰ In *FCC v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984), the Court held that under former Rule 11.3, a direct appeal taken during the pendency of a Rule 59 motion was permissible since the motion did not seek alteration of the rights adjudicated in the original judgment. See *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212 (1952) ("The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."). In this case, the post-trial motions arguably did not seek to alter the rights adjudicated. The Rule 59(e) motion here asked the district court to limit the injunction to Playboy and thus would not have affected Playboy's rights. The Rule 60(a) motion asked the district court to include in its injunction what the court in its underlying decision announced it was requiring—that Playboy must ensure in its contractual arrangements that cable operators provide "adequate notice" of the availability of free lock-boxes.

mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." On March 18, 1999, when the district court dismissed the Rule 60(a) motion for lack of jurisdiction, this appeal had not yet been docketed in this Court. Accordingly, the district court had jurisdiction to correct the mistake "just as if the case were still pending in the district court." 11 Charles Alan Wright et al., *Federal Practice and Procedure*, *supra*, § 2856, at 251.

The filing of the notice of appeal also did not divest the district court of jurisdiction to rule on the Rule 59(e) motion that was already pending when the notice of appeal was filed. This Court's Rule 18.1, which governs the commencement of appeals to this Court, is comparable to Rule 4 of the Federal Rules of Appellate Procedure, as it existed before 1979. Interpreting the pre-1979 Rule 4, this Court explained in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58-59 (1982) (per curiam), that while a district court lacked jurisdiction to entertain a Rule 59(e) motion after a notice of appeal had been filed, "if the timing was reversed—if the notice of appeal was filed after the motion to vacate, alter, or amend the judgment—* * * the district court retained jurisdiction to decide the motion, but the notice of appeal was nonetheless considered adequate for purposes of beginning the appeals process." The reason this "theoretical inconsistency" was permitted under the pre-1979 rule was that there was little danger that a court of appeals and a district court would be acting simultaneously on the same judgment since a district court at that time did not automatically notify the court of appeals that a notice of appeal had been filed. *Id.* at 59.¹¹

¹¹ As the Court explained in *Griggs*, the 1979 amendments to Rule 4 altered the situation by making it clear that the court of appeals had no

A direct appeal to this Court under Rule 18.1 functions similarly. After the notice of appeal is filed, the appellant is given 60 days within which to file its jurisdictional statement. Until the matter is docketed in this Court, there is no chance that the district court would be acting on a judgment at the same time as this Court. Because the jurisdictional statement in this case had not been filed at the time the district court dismissed the Rule 59(e) motion, that dismissal was improper and should be reversed.¹²

3. The question whether the government's notice of appeal divested the district court of jurisdiction is of substantial significance to the government and to other litigants in cases in which there is a right of direct appeal to this Court. The parties in such cases often must determine how to preserve both their right to appeal and their ability to seek postjudgment relief from the district court, which may alter the nature of the appeal to this Court or even render

jurisdiction so long as a motion to vacate, alter, or amend the judgment was pending in the district court. 459 U.S. at 59-60. This in turn created a trap for the would-be appellant who failed to file a second notice of appeal after the disposition of the post-trial motion. Accordingly, Rule 4 was modified again in 1993 to provide that a notice of appeal filed after judgment but before the disposition of a posttrial motion "becomes effective to appeal a judgment or order * * * when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(i).

¹² Alternatively, if the filing of the Rule 59(e) motion tolled the time to file the first notice of appeal under both Section 561(b) of the Act and 28 U.S.C. 1253, and if it is concluded that the Rule 59(e) motion "actually seeks an 'alteration of the rights adjudicated' in the court's first judgment," *FCC v. League of Women Voters*, 468 U.S. at 573 n.10 (quoting *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942)), then the first notice of appeal may have been ineffective, at least insofar as the government sought to challenge the injunction as a final judgment. An ineffective notice of appeal would not divest the district court of jurisdiction. In that event, it should be noted that the second notice of appeal would remain sufficient to bring this case properly before this Court.

such an appeal unnecessary. Under the district court's ruling in this case, a litigant who wants to file a post-judgment motion may do so only at the risk of forfeiting the litigant's right to appeal. Plenary consideration of the district court's ruling by this Court would advance the interests of litigants, the district courts, and this Court in orderly litigation of cases involving direct appeals to this Court.

CONCLUSION

This Court should note probable jurisdiction.

Respectfully submitted.

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APRIL 1999

APPENDIX A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

No. Civ.A. 96-94-JJF

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Dec. 28, 1998]

OPINION OF THE COURT

ROTH, Circuit Judge.

Plaintiff, Playboy Entertainment Group, Inc. ("Playboy") challenges the constitutionality of section 505 of the Communications Decency Act of 1996, 47 U.S.C. § 561 ("CDA") which regulates signal bleed, *i.e.*, the partial reception of sexually explicit adult cable television programming in the homes of non-subscribers to that programming. Playboy seeks a declaratory judgment that § 505 violates the First Amendment and the Equal Protection guarantee of the Fifth Amendment of the United States Constitution and also seeks injunctive relief, preventing the United States, the United States Department of Justice, Attorney General Janet Reno, and the Federal Communications Commission

(collectively "the Government") from enforcing Section 505.

I. Procedural Background

The procedural background of this lawsuit is described at length in our opinion denying the preliminary injunction. See *Playboy Entertainment Group, Inc. v. United States of America*, 945 F. Supp. 772 (D. Del. 1996), *aff'd mem.*, — U.S. —, 117 S. Ct. 1309, 137 L.Ed.2d 473 (1997) ("PI Opinion"). We will set out that background briefly here.

On February 26, 1996, Playboy filed an action challenging § 505 of the CDA. Playboy's action was consolidated with one brought by Graff Pay-Per-View ("Graff"), owner of two adult networks, Adam & Eve and Spice. Judge Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit then granted the parties' request to appoint a three-judge district court pursuant to § 561(a) of the CDA.¹ She named to the panel Judge Joseph J. Farnan, Jr., of the U.S. District Court for the District of Delaware, Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey, and Judge Jane R. Roth of the U.S. Court of Appeals for the Third Circuit.

On March 7, 1996, Judge Farnan granted Playboy's motion for a temporary restraining order, enjoining enforcement of § 505 until the matter could be heard by the three judge panel. *Playboy Entertainment Group*,

¹ Section 561(a) of the CDA provides that a three judge district court shall be convened to decide "any action challenging the constitutionality on its face, of this title or any amendment made to this title . . . pursuant to the provisions of section 2284 of title 28, United States Code."

Inc. v. United States of America, 918 F. Supp. 813 (D. Del. 1996) ("TRO Opinion").

After a hearing, the three judge panel on November 9, 1996, denied Playboy's application for a preliminary injunction and lifted the temporary restraining order. See PI Opinion, 945 F.Supp. at 792. After affirmance of that order by the Supreme Court, Graff withdrew from the litigation, but Playboy pressed on.

Playboy contends that § 505 infringes the free speech protections provided by the First Amendment of the U.S. Constitution. Additionally, Playboy asserts that the language of § 505 is unconstitutionally vague. Finally, Playboy claims that § 505 violates the Equal Protection guarantee of the Fifth Amendment of the U.S. Constitution by singling out Playboy as a network "primarily dedicated to sexually oriented programming," while not regulating signal bleed from other premium networks which transmit sexually oriented programs. The parties cross-moved for partial summary judgment on the vagueness issue; these motions were denied on October 31, 1997. A pretrial conference was held on February 19, 1998, and trial was held on March 4-6, 1998, and post-trial argument on May 28, 1998.

II. Findings of Fact

While many of the background facts, especially regarding the technology of cable transmission, are set out in our opinion denying the preliminary injunction, see PI Opinion, 945 F. Supp. at 776-782, some bear repeating.

1. Playboy challenges § 505 of the CDA, 47 U.S.C. § 561,² entitled "Scrambling of sexually explicit adult video service programming." This section requires a multisystem operator ("MSO")³ either to fully scramble⁴ or to time channel "sexually explicit adult programming or other programming that is indecent" on any of its channels that are "primarily dedicated to sexually-oriented programming." The purpose of this provision is to eliminate "signal bleed," which is the partial reception of video images and/or audio sounds on a

² Section 505 of the CDA, 47 U.S.C. § 561 provides:

(a) REQUIREMENT—In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) IMPLEMENTATION—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) DEFINITION—As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

³ Section 505 applies to "multichannel video programming distributors," which are also known as "multisystem operators" or "MSOs." We will refer to them as MSOs.

⁴ Scrambling means "rearrang[ing] the content of the signal . . . so that the programming cannot be viewed or heard in an understandable manner."

scrambled channel. The stated methods of eliminating signal bleed are either by blocking the transmission of the targeted programming or by limiting its transmission to the hours of the day when a significant number of children are not likely to view it ("safe harbour hours"). The FCC regulation implementing time channeling would limit adult programming to the period between 10:00 p.m. and 6:00 a.m. *In re Implementation of Section 505 of the Telecommunications Act of 1996*, CS Dkt. No. 96-40, FCC 96-84, Order & Notice of Proposed Rulemaking amending 47 C.F.R. § 76 ¶ 6.

2. MSOs provide cable subscribers with various packages of cable channels for which the subscribers pay a monthly fee. There is a "basic" package of local broadcast networks (*e.g.*, ABC, CBS, Fox, and NBC), leased and public access channels, and news, education, music, sports and shopping networks. MSOs also provide "premium" channels, for which they charge an additional fee. These premium channels include HBO, Cinemax, Showtime, and the adult entertainment channels. Premium programming may also be offered on a "pay-per-view" basis. The pay-per-view customer places an order with the cable operator for a specific program or a specific period of time. When a consumer places a pay-per-view order, the MSO unscrambles the signal for the viewing period and then rescrambles it by remote accessing a converter box in the subscriber's home.

3. Playboy and Graf provide MSOs with adult, sexually oriented video programming. The MSOs then transmit the programming to premium subscribers and pay-per-view purchasers. Playboy owns two adult-programming networks, Playboy Television and AdultTVision. The programming on the Playboy

network is virtually 100% sexually explicit adult programming. On a yearly basis, 3 million households subscribe to and/or receive pay-per-view sexually explicit adult programming through the Playboy or Graf channels.

4. Other non-adult premium networks have obtained licenses to exhibit particular Playboy films. In addition, non-adult premium and basic cable channels will at times transmit sexually explicit programs or programs which contain some sexually explicit scenes. At the PI hearing, we noted as an example that the number of sexually explicit programs available on non-adult channels on one Friday evening in Denver, Colorado, was one-sixteenth that shown on the adult channels. Moreover, unlike the adult channels, the sexually explicit programming on non-adult channels was mainly "R" rated movies which contained some sexually explicit scenes but were not continuously sexually explicit.

5. MSOs receive signals, mainly in analog form, from many sources, such as master antennas, satellites, and local television stations. The signals are received at the system transmitter or "head-end" where they are amplified and retransmitted by coaxial cable. Cable subscribers receive the channels directly by cable, if they own a cable-ready television, or by attaching the cable to a converter box if they own a non-cable-ready television.⁵ A recent development in signal transmission is

⁵ A converter box permits an older model television set, which can receive only a finite number of VHF or UHF channels, to receive the larger number of channels transmitted by cable systems. Converter boxes are electronic channel selectors. They are connected both to the subscriber's TV set and to the MSO's cable line. When a subscriber chooses a cable channel to view, the box

the Head-End-in-the-Sky ("HITS"), an orbiting digital platform which takes network signals, like Playboy's, and bounces them from a satellite in digital form to a cable system's receive station. The cable system then pumps the digital signal down an analog cable television wire to a consumer's home where a set-top box converts the signal back to an analog one suitable for the standard contemporary television set. The box required to make this conversion is fairly expensive and there are fewer than 50,000 homes today with a digital box. An additional 3 million cable homes receive a direct digital signal.

6. Because of the additional cost of premium and pay-per-view programming, MSOs seek to secure these signals for subscribers only. To prevent a signal from reaching the home of a non-subscriber, MSOs "scramble" the signal in an analog system by using either "RF" or "baseband" technology. Generally, the scrambling affects only the video portion of the transmission.

7. Cable television technology has evolved over the last 20 years. A variety of scrambling technologies are used by MSOs when broadcasting in analog form.⁶ Forms of scrambling are

a) "RF" or "baseband" scrambling. This is the method most MSOs use for a signal sent by coaxial cable from the MSO to cable subscribers. Generally, this type of scrambling affects only the video portion of the transmission. Some baseband systems, however, include audio encryption as well. Once the signal is

"converts" the selected channel to a frequency that the subscriber's TV set can receive and display.

⁶ This technology is not necessary when an MSO sends its signal in digital form.

scrambled, the MSO must then descramble it for subscribers.

b) Positive traps. These are devices that are installed at the MSO transmitter and jam the signal of the channel being secured. Nonsubscribers to that channel will receive only "snow" for video and a high-pitched beep for audio. Subscribers to the jammed channel receive a metal cylinder, the positive trap, which is attached to a cable-ready TV or to the set-top converter box in order to filter out the jamming signal.

c) Negative traps. In the case of negative trapping, the signal is transmitted in the clear, and the negative trap, installed on the cable wiring at the homes of the nonsubscribers, jams the signal. Negative traps cost between \$12 and \$15 per household.

d) Addressable converters. These are boxes which are attached to the television set. The MSO can remotely "address" an addressable converter by sending out an electrical impulse to descramble or rescrumble a signal. Addressable converter technology is the only type that provides the necessary equipment for pay-per-view requests. A converter costs approximately \$115 per television set.

8. Section 505 was enacted to remedy the problem of "signal bleed." Signal bleed occurs when a signal is not completely scrambled by the MSO's RF or baseband equipment, and the video and/or audio is wholly or partially discernible. While signal bleed is caused by inadequate RF or baseband technology, bleed does not occur when RF or baseband technology is used in conjunction with positive or negative traps ("double scrambling"). In addition, bleed does not occur in systems where TVs have converter boxes, addressable or

otherwise, with channel mapping.⁷ However, bleed does occur when consumers do not have a converter box with channel mapping or when they have a cable-ready TV, obviating the need for a converter box. Bleed does not occur when MSOs broadcast their signal in digital, as opposed to analog form.

9. Signal bleed becomes a problem when a cable subscriber, who does not subscribe to a premium channel, tunes to that scrambled channel and receives a signal which may include all or portions of the video picture and/or audio signal. The cause of this phenomenon is known as random lockup. The severity of the problem varies from time to time and place to place, depending on the weather, the quality of the equipment, its installation, and maintenance. Because of the existence of this problem, a child may tune to a scrambled channel and receive discernible images even though the parent is not a subscriber to the channel. This result is of particular concern where the programming is sexually explicit, intended for an adult-only audience.

10. In addition to § 505, there are a variety of technologies available to consumers to ensure that they do not receive signal bleed. Under § 504 of the CDA, 47 U.S.C. § 560,⁸ an MSO, upon request of any cable

⁷ Channel mapping is a feature whereby when a consumer attempts to tune a scrambled channel, the converter box will not tune to that channel but will tune to another channel providing either a promotional message or a blue screen.

⁸ (a) SUBSCRIBER REQUEST—Upon request by a cable service subscriber, a cable operator shall, *without charge*, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

service subscriber, must, free of charge, fully scramble or fully block both audio and video signals. This would eliminate reception both of undesired channels and of undesired signal bleed. In addition, modern TVs and VCRs have both lockout and V-chip features by which a consumer can program the TV or VCR to block reception either of an undesired channel or of offensive types of programming.

11. The pervasiveness of the signal bleed problem is a matter of dispute between the parties. At the preliminary injunction stage, we found that 40 million households in the United States have the potential for signal bleed but that the actual number of homes with signal bleed would be less, depending on whether the local MSO employed effective scrambling techniques and on how many of these households already subscribed to adult channels. PI Opinion, 945 F. Supp. at 779, ¶ 14. We invited the parties to present more specific evidence of this problem at the permanent injunction stage. The Government has now presented two types of evidence: a) a statistical analysis of the number of children *potentially* exposed to signal bleed, and b) anecdotal evidence of actual exposure.

a) Potential exposure—The Government presented expert witness testimony that 39 million homes with 29.5 million children have the potential to be exposed to signal bleed from sexually explicit programming on Playboy and Spice. See Defense Exhibit ("DX") 82, ¶ 25.⁹ Playboy argues that this estimate is too high

(Emphasis added).

⁹ Dr. Charles Jackson, an expert on the cable television industry, took the number of subscribers to cable systems that carry Spice, 22.1 million, added the number of subscribers to cable systems that carry Playboy, 27.6 million, and subtracted the number

because it fails to subtract 1) those households that are subscribers of adult programming and therefore are not subject to unwanted bleed, 2) those households on cable systems that employ more advanced technologies that prevent signal bleed, and 3) those households that have TVs, converters, and/or VCRs with built-in child lock circuitry that can bypass the audio and video of any channel. While it is not clear to what degree the Government's estimate of potential exposure should be lowered, the nature of this dispute points to the underlying problem with the Government's analysis. The Government presented evidence of households with the "potential to be exposed"; the Government presented no evidence on the number of households actually exposed to signal bleed and thus has not quantified the actual extent of the problem of signal bleed.

b) Anecdotal evidence—The Government presented evidence of two city councillors, eighteen individuals, one United States Senator, and the officials of one city who complained either to their MSO, to their local Congressman, or to the FCC about viewing signal bleed

of households on cable systems carrying both Playboy and Spice, 11.05 million, to conclude there are 38.65 million households with the potential to be exposed to signal bleed. Dr. Jackson used a Cable Advertising Bureau estimate of the number of cable households with children, 36.7%, and a Census estimate that the average household with children has slightly more than two children present (2.07). Multiplying the number of cable households by the number of cable households with children by the number of children in an average household yields the number of children in households with the potential to be exposed to signal bleed of sexually explicit television. He then concluded in these close to 39 million households with the potential to be exposed to signal bleed from both Playboy and Spice, there are roughly 29 million children (16.7 million at risk from Playboy). DX 82, ¶¶ 20-33.

on television. DX 45-59, 61-64, 66-68, 70.¹⁰ In each instance, the local MSO offered to, or did in fact, rectify the situation for free (with the exception of 1 individual), with varying degrees of rapidity. Included in the complaints was the additional concern that other parents might not be aware that their children are exposed to this problem. In addition, the Government presented evidence of a child exposed to signal bleed at a friend's house. Cindy Omlin set the lockout feature on her remote control to prevent her child from tuning to adult channels, but her eleven year old son was nevertheless exposed to signal bleed when he attended a slumber party at a friend's house. Omlin Dep. at 8-19.

12. The Government has presented evidence of only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting. The Government has not presented any survey-type evidence on the magnitude of the "problem." Nor has the Government demonstrated that the theoretical calculation by

¹⁰ Beth Mahlo, Rock Island City Council, Rock Island, IL.; Anthony Snesko, Poway City Council, Poway, CA.; Frank Allen, Jr., Oxnard, CA.; Ann Harris, Orange, CA.; Chuck Davis, Orange, CA.; John Augustine, Laureldale, PA.; Ann Trine, State Center, IA.; Betty J. Lewis, Bossier City, LA.; M.V. Walters, San Antonio, TX.; Hugh Cunningham, Professor Emeritus, University of Florida College of Journalism, Gainesville, FL.; Pat Faulkenberry, Columbus, GA.; Timothy Joyce, Yorktown, NY.; Louisa Lindell, Wilmington, DE. (son viewed signal bleed at friend's house); Phil Vonder Haar, Webster Groves, MO. (viewed signal bleed at daughter's in St. Louis); Cecilia Flake, Battle Creek, MI. (told would be charged \$6.00 to have signal blocked); David DeBerry, Assistant City Attorney, Orange, CA., on behalf of the City of Orange; Carol Beecher, Monticello, IN.; Jeff Schiske; Joseph & Ann Marie Schewe, Latham, N.Y.; Lorraine Serzega, Phoenixville, PA.; Christina Petsas, Martinez, CA.; Senator Joseph R. Biden, Jr., Wilmington, DE.

Dr. Jackson on potential for signal bleed is actual reality—that in fact x million children are exposed to signal bleed. See Post-trial Argument Tr. 57-62.

Legislative History of § 505

13. On June 12, 1995, after hearings and debate had been held regarding the 1996 Telecommunications Act, Senator Diane Feinstein of California and Senator Trent Lott of Mississippi offered Amendment 1269 which ultimately became Section 505 of the Act.

14. Senator Feinstein told members of the Senate that "[p]arents . . . come home after work only to find their children sitting in front of the television watching or listening to the adult's-only channel, a channel that many parents did not even know existed." Cong. Rec. S8167; see Playboy Exhibit ("PX") 20. She noted that guidelines which put the burden on the subscriber to request complete scrambling of adult channels were inadequate because often non-subscribers are unaware that indecent audio and/or video signals could be received. *Id.* The object of the amendment, she said, was to "protect [] children by prohibiting sexually explicit programming to those individuals who have not specifically requested such programming."

15. Senators Feinstein and Lott each spoke briefly about their proposed amendment. 141 Cong. Rec. S8166-S8169. Except for the statements of Senators Feinstein and Lott, there was no debate on the amendment and no hearings were held on it. The amendment passed easily in the Senate (91 votes in favor and none opposed) and became § 505 of the bill that emerged from the House/Senate conference.

**Harm from Exposure to Signal Bleed of
Sexually Explicit Programming**

16. Playboy's expert witness, Dr. Richard Green, a psychiatrist specializing in the field of psychosexual development, testified that in his opinion there were no adverse effects demonstrated from exposure of children or adolescents to sexually-explicit video materials. Dr. Green did acknowledge on cross-examination that he had written a book entitled **Sex and the Life Cycle** in which he stated at page 26 that

The overlap between many of the physical behaviors involved in typical sexual conduct and those involved with aggressive conduct renders the visual experiencing of adult sexuality by young children potentially confusing and hazardous.

17. The Government presented no evidence of a clinical nature showing any harm associated with signal bleed. The Government's expert witness, Dr. Elissa P. Benedek, a board-certified child psychiatrist, testified about the nature and duration of harm that minors might suffer by virtue of being exposed to sexually explicit programming. Dr. Benedek then hypothesized that viewing signal bleed of sexually explicit programming would have a similar effect, perhaps to a lesser degree, as watching sexually explicit programming. For this postulation, Dr. Benedek relied on clinical studies done in a related area: the effect on minors of television violence, as well as on anecdotal evidence—a few isolated incidents of exposure by minors to signal bleed and their reactions.¹¹

¹¹ When pressed at post-trial argument as to whether there was evidence, anecdotal or otherwise, of any child actually harmed by signal bleed, the Government could point to only one incident:

a) Nature of harm—Dr. Benedek suggested that most minors would suffer dysphoria which she explained as “kind of a catch word for unpleasant feelings [that] encompasses disgust, horror, general distaste, and just not feeling good about something.” Trial Tr. 471:24-472:2. In the rare child, Dr. Benedek explained, dysphoria might be correlated with other symptoms such as bed wetting or school phobia. *Id.* at 476:21-77:9. Other children might exhibit modeling behavior: “children will imitate, model, attend to, incorporate, assimilate . . . materials they are exposed to.” Trial Tr. at 487:18-20. Furthermore, viewing sexually explicit programming might affect a child's attitudes towards sex—that sexually-explicit images can be confusing to children; that children although they should learn about adult sexuality, can acquire misperceptions about sexuality if they are exposed to explicit sexuality—especially out-of-context sexuality—in the wrong environment, and without sufficient preparation; [and] that as a result of viewing sexually explicit television, child's attitudes can change” *Def. Post-trial R.Br.* at 5. Of these harms associated with watching sexually-explicit programming, the only one that Dr. Benedek clearly linked to viewing signal bleed of sexually explicit programming was the modeling of unblocked audio. Trial Tr. at 487.

b) Duration of Harm—Dr. Benedek explained that in the vast majority of cases, the effects postulated above would be transient, or temporary. Trial Tr. 501:1-4 (“I

Cindy Omlin's testimony that her child viewed signal bleed at a friend's house on a Friday night, and on the ensuing Monday morning awoke with a bad stomach ache, saying he didn't want to go to school. Dr. Benedek described these symptoms as school phobia. Post-trial Argument Tr. at 84-86.

would say that in the vast majority of cases, the effects are not long-term effects."); Benedek Dep. Tr. 138:9-10 ("Transient is less than enduring, so it could be momentary.").¹²

The Technological and Economic Impact of § 505

18. At the time of the preliminary injunction hearing, it was not clear what any given MSO, with a system emitting signal bleed, would do when faced with complying with § 505. Each MSO would have the option of upgrading its technology from analog to digital transmission, of time channeling, or of distributing channel-mapping capable converters, lockboxes, or positive or negative traps to all their customers. Plaintiffs argued that MSOs would find time channeling the least costly choice, losing only 30% of their revenues, whereas losses would average 50% of revenues for the next best option, double scrambling, *i.e.*, scrambling via baseband or RF technology plus a positive trap.¹³ As predicted, the vast majority (in one survey,

¹² The weight we gave to Dr. Benedek's testimony was diminished by the fact that she has not written or researched in any directly relevant area. Moreover, she has reviewed no literature concerning the effects of television viewing upon children except for the few articles provided to her by counsel for the government. She has never previously testified as an expert involving the media in general or television's effects in particular. She has in the past been retained to testify as an expert but this has been on a spectrum of other issues arising in unrelated products liability and personal injury contexts.

¹³ PX 152 at 2; PI Tr. 435-38 (Testimony of Defendant's expert Jonathan Kramer). Neither negative traps nor positive traps alone would be viable options because neither allow an MSO to broadcast any pay-per-view programming; revenues from pay-per-view programming constitute the vast majority of Playboy's revenue. PI Tr. 430-33. Alternatively, the cost of converting an analog-

69%) of cable operators have, in response to § 505, moved to time channeling. *See* DX 320;¹⁴ Pl. Post-trial Br. at 54-55. Neither Playboy nor the Government could identify a single cable system that had adopted double scrambling to comply with § 505. In effect, the practical impact of § 505 has been to reduce the broadcast day for sexually explicit programming to an eight-hour safe harbor period of 10:00 p.m. to 6:00 a.m. This is because most MSOs have no practical choice but to curtail such programming during the other sixteen hours or risk the penalties imposed by the CDA if any audio or video signal bleed occurs during these times.

19. The effect on Playboy of cable systems moving to time-channeling is primarily economic. However, Playboy argues that the economic impact of § 505 is significant and serves as a quantitative measure of the lost First Amendment opportunities suffered by Playboy and its viewers. Time channeling, the removal of sexually explicit programming during two-thirds of the broadcast day, precludes all households from receiving

based system to digital at this point in time would be in the billions of dollars with each household needing a digital converter. This too would not be a viable option as it would be cost-prohibitive. PI Tr. 423-28. Alternatively, the cost of supplying every cable subscriber with state of the art converters with channel-mapping would also be cost-prohibitive. PI Tr. 428-29; PI Opinion, 945 F.Supp. at 781, ¶ 24.

¹⁴ Defense Exhibit 320 is a Government survey of MSOs taken after § 505 was implemented on May 18, 1997. This survey demonstrates 68% of MSOs surveyed who carry adult programming went to time channeling. PX 106. This includes 23 of 24 Jones Inter cable systems and 36 of 38 TCI systems. While only 17 of 39 Comcast systems surveyed are time-channeling, PX 104, Comcast has a reputation for having better, more up-to-date technology than other MSOs

such programming during that time. Given that 30 to 50% of all adult programming is viewed by households prior to 10 p.m.,¹⁵ the impact on Playboy and its viewers¹⁶ is significant. Playboy estimates its losses at \$25 million through 2007, or 15% of revenues. The Government estimates Playboy's losses through 2002 at \$6 million.¹⁷ The actual amount of Playboy's losses is of little relevance to our First Amendment analysis. Suffice it to say that Playboy will lose a significant amount of money as a result of cable operators' time channeling in order to comply with § 505.

¹⁵ PX 184 (Jones Intercable showing that 55% of Playboy's buys, and 50% of Adult Vision buys occurred during non-safe harbour hours); PX 192 (Spice estimates that 30-50% of its buys occur between 6 AM and 9 PM); Sealed PX 216 (Time Warner-Rochester, N.Y. instituted a voluntary rollback to safe harbor hours demonstrating a significant decline in adult programming purchases); see also *Pl. Post-trial Br.* at 57 & n. 108.

¹⁶ The number of subscribers watching Playboy Television in a year is between 800,000 and 1.7 million.

¹⁷ The primary disagreement over losses is differing time horizons which stems from an uncertainty over when digital technology will be commonplace, obviating the need for cable operators to time channel. The Government economics expert, Dr. Der-touzos does not include losses after 2002 because of his uncertainty as to the pervasiveness of digital technology thereafter, but he acknowledges that he has no expertise regarding the conversion of the cable industry from analog to digital. Trial Tr. 746:9-12. Furthermore, Playboy presented experts knowledgeable in the area of cable conversion; all concluded that a considerable percentage of cable systems will remain "analog only" over the next ten years. *Pl. Post-trial Br.* at 59 & n. 112. Clearly then, the measure of damages is at least somewhat greater than the Government estimate of \$6 million.

Efficacy of Section 504

20. Section 504 of the CDA also requires MSOs to completely block upon request any programming that a cable systems customer desires, whether sexually explicit or otherwise. The MSO, not the subscriber, must bear the cost of providing the blocking mechanism. Playboy argues that § 504 presents a constitutionally "less restrictive alternative" to § 505 because it would achieve the same purpose: complete blocking for those who want it, with less restriction of Playboy's First Amendment rights. A key variable in the efficacy of § 504 is the type of notice that cable system customers receive about their rights under § 504. As we found at the preliminary injunction stage, "[i]f the § 504 blocking option is not being promoted, it cannot become a meaningful alternative to the provisions of § 505." PI Opinion, 945 F.Supp. at 781, ¶ 23. There, we invited the parties to present further evidence of "the actual and predicted impact and efficacy of § 504." *Id.*

21. The CDA, of which §§ 504 and 505 are a part, went into effect on March 9, 1996. The enforcement of § 505 was enjoined from March 6, 1996, three days prior to its implementation, until May 18, 1997. This stay provided a 14-month opportunity to observe the efficacy of § 504 without § 505.¹⁸ In that 14 months, the number of lockboxes distributed was minimal. A Government survey determined that cable operators distributed § 504 lockboxes to block adult cable channels to

¹⁸ When § 504 and § 505 are both being enforced, with respect to regulating sexually explicit programming, § 504 does not relieve an MSO from complying with § 505. Complying with § 504, *i.e.*, providing free lockboxes, does not comply with § 505's more stringent requirements.

less than one-half of one percent (0.5%) of their subscribers. Tr. Trans. 655-59 (Dertouzos); DX 154, 145 (survey of 79 MSOs of roughly 6000 country-wide with 62 answering the question of how many adult-channel lockboxes they had distributed since the earliest known date?¹⁹). A May 1997 memorandum from Jones Inter-cable (a leading MSO) to its cable systems appears to confirm the Government survey results. DX 137.²⁰

22. If, however, § 504 is to be an effective alternative to § 505, adequate notice of the availability of the no-cost blocking devices is critical. In order for Playboy to prevail on its claim that § 504 is a less restrictive alternative to § 505, Playboy must demonstrate that § 504 is efficacious. The type of notice given is crucial to the implementation of § 504. Parents must be aware that MSOs have the ability to, and are required to, block channels that parents find offensive. Parents must also be aware that the MSOs are required to do so free of charge. The Government notes that "cable operators communicate the availability of channel blocking devices to their subscribers through a variety of means such as monthly billing inserts, special mailings, barker channels, and adult-channel advertisements." *Gov't Post-trial Br.* at 41 referring to two sample inserts PX 194, 196.

¹⁹ The language "earliest known date" may slightly overestimate the utility of § 504 as a solution to the signal bleed problem because some of these lockboxes may have been distributed pursuant to 47 U.S.C. § 544(d)(2) (1984) which provided that cable operators shall provide lockboxes upon request of their subscribers, but they could charge subscribers for the blocking device.

²⁰ It states that "Jones cable companies have always complied with § 504" by providing equipment to "trap the audio and video signals on adult programming services," but only "a minimal number" of traps were requested. DX 137 at JIP000005.

23. Notwithstanding the adequacy of any notice given, the Government argues that § 504 is not a less restrictive alternative because it is not effective at controlling the problem of signal bleed; the mere fact that so few lockboxes were distributed suggests that voluntary requests for lockboxes will not solve the problem. Playboy provides an alternate explanation for the low number of boxes distributed—the lack of parents' concern. If parents don't think-signal bleed is a problem, they won't request lockboxes, whether free or otherwise. The underlying premise of Playboy's argument is that parents are aware of the occasional signal-bleed situation and have decided that it is not a problem.

24. The Government enumerates other potential problems regarding § 504. The Government suggests that it may take weeks for cable operators to comply with a subscriber's request for a lockbox. *Cavalier Dep.* at 17-22, 27; *Bennett Dep.* at 9-10. The Government also contends that the device may fail. *Henne Dep.* at 9-10. In addition, after a subscriber has installed a blocking device, the cable operator may move the adult network to a different channel, rendering the block ineffective. *Henne Dep.* at 11-16.

25. Concerning the economic feasibility of § 504, the Government presented evidence that the distribution of lockboxes to a sufficient number of customers to effectively control the problem of signal bleed is not economically feasible. The Government's economics expert, Dr. Dertouzos studied the "break-even" point—the point at which the cost of distributing lockboxes would exhaust all of a cable system's adult channel revenues. He determined that even if a substantial number of parents requested lockboxes, it is "economically unfeasible to distribute more than a trivial number

of [lockboxes] to subscribers." Trial Tr. at 661-62. Using Playboy's buy rate for the first quarter of 1997 and the average retail price for Playboy programming during that period, the number of traps that could be distributed is 3.0 percent of the subscriber base. *Gov't Post-trial Br.* at 43.²¹ If one considers a five year revenue stream in the break-even analysis, the number of traps that could be distributed rises to 6.0 percent of the subscriber base. *Id.* The finding that the cost of distribution of boxes is not feasible for a cable system is confirmed by the statement of Playboy's expert witness, John Mancell. Mancell attested that the cost of distributing negative traps to 56 percent of subscribers without addressable converters would exceed \$434 million, PX 61, ¶¶ 8, 20, which is far above cable operators' revenues from adult-networks, estimated at \$78 million. PX 60, ¶ 21. Economic theory would suggest that profit-maximizing cable operators would cease carriage of adult channels if the cost of distributing boxes exceeded the revenue generated by the adult channels, or even if costs rose to such a point that the profit from adult channels was less than the profit from channels unlikely to require blocking. Trial Tr. at 941.

²¹ These calculations are premised on a cost of \$37 per blocking mechanism plus installation. Playboy's contention that negative traps can be mailed to subscribers thereby obviating the need for installation labor costs and lowering the cost per mechanism to the cost of the product plus postage, is unavailing. All experts agree that negative traps are installed on the cable pole or the cable itself outside the home, requiring installation. PX 65 (Ciciora PI Decl.), ¶ 19; DX 303 (Jackson PI Decl.), ¶ 35; Ciciora Dep. at 146:20-21 ("The presence of the negative trap is almost always outside on the pole").

III. Conclusions of Law

Playboy seeks a declaratory judgment that § 505 of the CDA is unconstitutional and an injunction against the Government from enforcing its provisions. Playboy challenges § 505 on the grounds that it is a content-based restriction on speech that must satisfy strict scrutiny under the First and Fifth Amendments, that the Government did not meet its burden of demonstrating that § 505 is necessary to serve a compelling governmental interest, and that § 505 does not employ the least restrictive means of addressing the issue of signal bleed. Playboy argues as well that § 505 violates the Equal Protection guarantee of the Fifth Amendment of the U.S. Constitution and contains unconstitutionally vague terminology. Because we find that § 505 is not the least restrictive means of addressing the issue of signal bleed, we hold that § 505 violates the First Amendment. For that reason, we do not reach Playboy's other arguments regarding equal protection and vagueness.

Standard of Review

Playboy claims that § 505 burdens its rights guaranteed under the First Amendment by inhibiting its freedom of speech. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Our first task is to determine the standard of review to which we will subject the statute at issue. At the preliminary injunction stage, we held that "§ 505 should be treated as a content-based restriction on speech" and that "we should apply either strict scrutiny or something very close to strict scrutiny when a content-based law, applicable in the cable television context, is challenged

on the grounds that it violates the First Amendment.” PI Opinion, 945 F. Supp. at 784-85 & n. 24. We recognize in this regard that no majority of the Supreme Court has ever accepted the argument that sexually explicit, but not obscene, material receives less protection under the First Amendment than artistically, politically, or scientifically valued forms of speech. See *Denver Area Educ. Telecommunications Consortium v. FCC*, 518 U.S. 727, 116 S. Ct. 2374, 135 L.Ed.2d 888 (1996) (reaffirming the principle that sexual expression which is indecent but not obscene is protected by the First Amendment). Nothing presented at trial, and no jurisprudence subsequent to the Preliminary Injunction Opinion in 1996, has changed the analysis or outcome reached there. See, e.g., *Reno v. A.C.L.U.*, 521 U.S. 844, 117 S. Ct. 2329, 2346, 138 L.Ed.2d 874 (1997) (“[s]exual expression which is indecent but not obscene is protected by the First Amendment”).

The Government continues to argue that its constitutional burden is reduced by virtue of the fact that this legislation is content-neutral and attacks the “secondary effects” of exposure to sexually explicit material. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986) (holding that a zoning ordinance that prohibited motion picture theatres from locating within 1000 feet of certain residential zones was properly analyzed as a time, place and manner restriction, and thus subject to intermediate scrutiny). But it is clear that the *Renton* “secondary effects” analysis does not apply where regulation of adult movie theatres is based on “the content of the films being shown inside the theatres.” *Boos v. Barry*, 485 U.S. 312, 319-21, 108 S. Ct. 1157, 99 L.Ed.2d 333 (1988) (“[I]f the ordinance [in *Renton*] was justified by

the city’s desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate.”); *Reno v. A.C.L.U.*, 521 U.S. 844, 117 S. Ct. 2329, 2342, 138 L.Ed.2d 874 (rejecting the Government characterization of a regulation on Internet indecency as “cyberzoning” and thus subject to the *Renton* “secondary effects” time, place and manner analysis; rather holding that the purpose of the CDA is to protect children from the primary effects of “indecent” and “patently offensive speech and thus strict scrutiny is appropriate”); *U.S. Sound & Service, Inc. v. Township of Brick*, 126 F.3d 555, 558-59 (3d Cir. 1997) (“If the government regulates non-obscene expression based on its sexually explicit content, the restrictions imposed pass constitutional muster only if they survive ‘strict scrutiny’—that is, only if they serve a compelling state interest in a manner which imposes the least possible burden on expression.”); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172 (3d Cir.) (en banc), cert. denied, — U.S. —, 118 S. Ct. 336, 139 L.Ed.2d 261 (1997).

As in the preliminary injunction opinion, we continue to view § 505 as a content-based restriction on speech. See PI Opinion, 945 F. Supp. at 785. Although § 505 is aimed at preventing signal bleed, a content-neutral objective, the section applies only to signal bleed occurring during the transmission of “sexually explicit adult programming or other programming that is indecent.” Signal bleed from the Disney Channel, for example, does not come within the purview of the statute. Congress’s targeting of signal bleed of solely sexually explicit programming is a content-based restriction.

To be sure, the context of this content-based restriction must also be considered because speech does not occur in isolation. Cable television is a means of communication that is both pervasive and to which children are easily exposed. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-50, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978) (radio broadcasting is pervasive and to which children are easily exposed); *Denver Consortium*, 518 U.S. at 744 (these two factors are as applicable to cable television as to broadcasting). Thus, this context cannot go unnoted.

In cases such as this, it is the Government's burden to demonstrate that its interests are compelling and that the means chosen "are carefully tailored to achieve those ends." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989). The Government must prove that § 505 is a "least restrictive alternative," i.e., that no less restrictive measures are available to achieve the same ends the government seeks to achieve. *Denver Consortium*, 518 U.S. at 754-55, 116 S. Ct. 2374; *Sable*, 492 U.S. at 130-31, 109 S. Ct. 2829.

Compelling Government Interest

The Government asserts three interests that in its view justify § 505: 1) the Government's interest in the well-being of the nation's youth—the need to protect children from exposure to patently offensive sex-related material; 2) the Government's interest in supporting parental claims of authority in their own household—the need to protect parents' right to inculcate morals and beliefs on their children; and 3) the Government's interest in ensuring the individual's right to be left alone in the privacy of his or her home—the

need to protect households from unwanted communications.

In its First Amendment jurisprudence, the Supreme Court has recognized the need to protect children from "exposure to patently offensive sex-related material." *Denver Consortium*, 518 U.S. at 743, 116 S. Ct. 2374. "The State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" *Ginsberg v. New York*, 390 U.S. 629, 640-41, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968) (upholding a statute prohibiting the sale to minors of sexually explicit magazines); *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L.Ed. 645 (1944); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978) (Court relied on the Government's interest in the well-being of children in upholding the constitutionality of the FCC's decision to prohibit the radio broadcast of indecent language during the day). There is no doubt that the State has an interest in protecting children. The question remains, however, whether the "harm," from which the State seeks to protect children, is in fact a harm to children. In other words, does viewing signal bleed of sexually explicit programming constitute a harm to children. If it is a harm, there is no doubt the State has a compelling interest in regulating it.

The Supreme Court has not required empirical proof of harm to justify content-based restrictions on constitutionally protected speech when children are involved. See *Pacifica*, 98 S. Ct. at 3040 (rationale for upholding the constitutionality of the FCC's decision to prohibit the radio broadcast of indecent language during the day was that broadcast "could have enlarged a child's

vocabulary in an instant;" not requiring the Government to prove that the monologue at issue could cause a scientifically articulable harm); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L.Ed.2d 549 (1986) (empirical proof of harm not required for restriction of speech in school setting); *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 661-62 (D.C. Cir. 1995) (en banc) ("the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.").²² However, some evidence of harm must be presented. The mere articulation of a theoretical harm is not enough. *See Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997) (striking down a law restricting the dissemination of "indecent crime materials to minors," explaining that although there was no dispute that protecting the psychological well-being of minors is a compelling interest, the Government could not enact an indecency regulation relying on "experience, knowledge and common sense," noting an absence of empirical proof that the law would serve the County's articulated interests). In

²² It must be noted that where "obscene" material is involved, as opposed to the sexually explicit but not obscene material at issue here, the standard of proof to which the Government is put is much lower. *See Ginsberg*, 390 U.S. at 641-42, 88 S. Ct. 1274 (because the material at issue was obscene, and therefore not protected speech, the State need only be rational in its conclusion of harm associated with the material); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-61, 93 S. Ct. 2628, 37 L.Ed.2d 446 (1973) (in the context of regulating obscene materials exhibited at "adult" theatres, rejecting the requirement of scientific data conclusively demonstrating the exposure to obscene material adversely affects people).

short, some evidence of harm short of definitive scientific proof must be presented. This case demonstrates a paucity of such evidence.

We have detailed the evidence of harm put forward by the Government. The Government presents no clinical evidence linking child viewing of pornography to psychological harms. Rather, the Government argues by analogy to clinical studies showing the effect of child viewing of televised violence as well as anecdotal evidence of the effects of sexually explicit television. The reference to televised violence research is weakened by the lack of evidence establishing the appropriateness of the analogy. Even if watching televised violence causes children to be violent, should the same hold true for televised sex? We cannot say that it would. The next weakly proven inference is that the effects of viewing signal bleed of sexually explicit television are the same as viewing sexually explicit television outright. This lack of evidence is reflected by the same dearth of evidence of harm within the legislative history of § 505. Moreover, there are clear ethical questions surrounding clinical research of the effects of children viewing sexually explicit programming.

The evidence presented on the type and duration of the harm is equally troubling. Dr. Benedek testified concerning transient dysphoria, modeling, and changed attitudes towards sexuality associated with susceptible children viewing explicit pornography. None of her views, however, are derived from observations of exposure to partially scrambled images and sounds of sexual activity. There is no evidence in this case that such scrambled, garbled, intermittent signal bleed has a harmful potential similar to explicit pornography.

Nevertheless, we are not prepared to say that there is no prospect of such harm.

We are troubled by the absence of evidence of harm presented both before Congress and before us that the viewing of signal bleed of sexually explicit programming causes harm to children and that the avoidance of this harm can be recognized as a compelling State interest. We recognize that the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved. See *Pacifica*, 98 S.Ct. at 3040. In conclusion, then, on the basis of the few scientific studies that have been done in related areas, keeping in mind Dr. Benedek's experience as a clinician and the anecdotal evidence she was exposed to in that capacity, and considering Dr. Green's comment on the hazards of children visually experiencing adult sex, we conclude that there is sufficient risk of harm to susceptible minors to warrant protection from sexually explicit signal bleed.

Turning then to the Government's next concern, concomitant with its interest in protecting children, it has an interest in protecting parent's authority to raise their children as they see fit. *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (liberty of parents to direct the upbringing and education of their children) (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042 (1923). A parent has a right to "inculcat[e] moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972); Cf. *Hodgson v. Minnesota*, 497 U.S. 417, 448-49, 110 S. Ct. 2926, 111 L.Ed.2d 344 (1990) (justifying waiting period before minor may exercise her fundamental right to an

abortion in part on the basis of parental interest in discussing implications of abortion decision, and providing guidance). On the basis of this interest, the Supreme Court has held that governmental restrictions of access by children to sexually explicit, but not obscene, material is justifiable. See *Ginsberg*, 390 U.S. at 639, 88 S.Ct. 1274 (upholding a restriction on sale of sexually explicit magazines to minors in part based on the recognition that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"). In *Pacifica*, the Court recognized the parental interest in deciding whether their child would be allowed to hear an indecent radio broadcast; this interest helped "justify the special treatment of indecent broadcasting." 438 U.S. at 749-50, 98 S. Ct. 3026; see also *Action for Children's Television v. FCC*, 58 F.3d 654, 661 (D.C. Cir. 1995) ("the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airways"). Section 505 addresses this compelling interest in that it ensures that parents can decide how best to teach their children about sex without the unwanted exposure to sexually explicit signal bleed. In short, § 505 ensures, for the most part that unwanted exposure does not occur.

The third interest of the Government is to protect the right of the individual to be left alone in the privacy of his or her home. See *Pacifica*, 438 U.S. at 749-50, 98 S. Ct. 3026 (relying on an individual's right to be left alone in his or her home to justify the content-based restriction of indecent radio broadcasting; "Patently offensive, indecent material presented over the airways confronts the citizen, not only in public but also in the privacy of the home, where the individual's right to be

left alone plainly outweighs the First Amendment rights of an intruder.”); *Rowan v. Post Office Dept.*, 397 U.S. 728, 90 S. Ct. 1484, 25 L.Ed.2d 736 (1970) (upholding a statute allowing private individuals to direct the Postmaster General to cease mailing “erotically arousing or sexually provocative” materials to their homes, noting that Congress passed the statute in order to protect the privacy of homes from unsolicited sexual materials). Section 505 embraces the individual’s right to be left alone in his home by restricting signal bleed to the safe harbour hours. Only individuals who subscribe to Playboy and who have therefore chosen to bring sexually explicit programming into their homes are exposed.

Least Restrictive Alternative Analysis

Recognizing that § 505 addresses three interests which in sum can be labeled “compelling,” we must determine whether § 505 is narrowly tailored to serve that end and whether it is the least restrictive alternative. Playboy argues that § 504 is a less restrictive alternative than § 505, mandating that we grant Playboy’s request for declaratory judgment and injunction against the enforcement of § 505. The basic difference between § 504 and § 505 is in determining who takes the initiative to remediate the signal bleed problem. Section 505 is an advance blocking of channels required of MSOs. Section 504 is a voluntary blocking of channels upon individual request. In either event, the MSO must pay the cost.

To be a “less restrictive alternative,” § 504 must be both less restrictive in the sense that it inhibits protected speech to a lesser degree and it must be a viable alternative in that it allows the Government to achieve

the ends that are its compelling interest. We think it is clear that § 504 is in fact less restrictive.

The restrictiveness of § 505 is now evident. The solution Congress crafted in § 505 to control the problem of signal bleed gave MSOs two alternative methods of compliance: 1) complete scrambling, or 2) time-channeling the programming into safe-harbor hours. There is no doubt that time channeling has proven to be the method of compliance of choice among MSOs.²³ While the effect of time channeling on Playboy’s profitability is perhaps not clear, time channeling certainly diminishes Playboy’s opportunities to convey, and the opportunity of Playboy’s viewers to receive, protected speech. Time channeling amounts to the removal of all sexually explicit programming at issue during two thirds of the broadcast day from all households on a cable system. Since 30-50% of all adult programming is viewed by households prior to 10 p.m. and since the restricted programming is protected speech, § 505 restricts a significant amount of protected speech. See *Reno v. A.C.L.U.*, 521 U.S. 844, 117 S. Ct. 2329, 2346, 138 L.Ed.2d 874 (1997) (Governmental interest in protecting children from indecent, but not obscene, materials does not justify an unnecessarily broad suppression of speech addressed to adults). Section 505 was designed to protect minors, but cable operators are

²³ As we found, MSOs with incomplete scrambling technology chose time channeling because no other system-wide blocking technique is economically feasible. Faced with the choice between overhauling the transmission to ensure complete scrambling, such as through a systemic switch to digital transmission, or by providing channel-mapping converter boxes to all subscribers, or by reducing such transmissions to safe-harbor hours, the MSOs have unanimously chosen to stop all such programming on dedicated adult channels during the non-safe harbor hours.

required to prevent bleed in all non-subscribing households, irrespective of whether a household has children. In fact, as we found, two-thirds of all households in the United States have no children.

The Government argues that the number of Playboy consumers is relatively small between 800,000 and 1.7 million, compared to the 16.7 million children potentially exposed to signal bleed. Moreover, as technology upgrades of equipment take place, more MSOs will be able to fully block signal bleed, rather than to time channel. The Government also argues that time channeling is a minor inconvenience, that the typical consumer can alter his or her viewing time to the safe harbour hours or can tape safe-harbour programming and play it back at his or her leisure. Therefore, the Government argues, the effects of time channeling are minimal. This misstates the issue. The question is not the significance of the totality of the effects of time channeling standing alone. It is instead the relative burden of one solution versus another. See *Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 787 n. 6 (3d Cir. 1990).

Section 504, by contrast to § 505, is less restrictive of the First Amendment rights of Playboy and its subscribers. Section 504 provides for voluntary blocking. Those consumers who request a blocking device will have one installed free of charge. However, for those who wish to receive Playboy programming, MSOs will be able to broadcast it 24 hours per day. In this way, neither Playboy nor its subscribers will suffer any First Amendment ill-effects. For that reason, § 504 is not restrictive of anyone's First Amendment rights and is clearly "less restrictive."

Furthermore, § 504 is a content-neutral regulation. It does not apply only to signal bleed of "sexually explicit adult programming or other programming that is indecent," as § 505 does. Rather, it applies to any signal bleed or to any programming that the requesting subscriber finds offensive. The fact that § 504 is content-neutral differentiates it from the content-based restrictions of § 505. See *Boos v. Barry*, 485 U.S. at 329, 108 S. Ct. 1157 (the existence of a content-neutral alternative "undercut[s] significantly" any defense of a content-based statute).

While § 504 is clearly less restrictive, it must also be a viable alternative. The Government argues that § 504 is not an effective alternative to § 505 because there are inherent limitations to parent-initiated blocking schemes which depend upon subscriber initiative and vigilance. See *Dial Information Services v. Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991) (rejecting voluntary blocking in the dial-a-porn context). Logically, a parent must be aware of the problem of signal bleed, before he or she is likely to examine potential solutions such as a lockbox. The Government argues that parents usually become aware of the problem only after the child has been exposed to signal bleed, and then the damage has been done. Furthermore, once aware of the problem, the success of § 504 depends on parental awareness that they have the right to receive a lockbox free of charge from their local MSO. Indeed, it was this same concern with parental awareness of signal bleed and of § 504 that motivated our rejection of § 504 as a less restrictive alternative at the preliminary injunction stage of this litigation. See PI Opinion, 945 F. Supp. at 789. There, we explained that "we ha[d] no evidence . . . whether local cable operators or producers of sexually

explicit programming [were] advertising the free availability of the § 504 lockbox or other blocking devices upon demand," and that we had no evidence whether "parents [were] otherwise aware of the § 504 means of achieving complete blocking of undesired channels." *Id.* "Upon [that] record," we held that "the government ha[d not] demonstrated an expectation that § 504 [would] be a viable alternative." *Id.*

That record has now been supplemented with information during the 14 month period when § 504 was in effect and § 505 was not. In that time, MSOs distributed lockboxes to less than one half of one percent of their subscribers. The Government relies on this statistic to establish that § 504 is clearly ineffective. At most, it blocked 0.5% of signal bleed. The first problem with the Government's argument is that the finding of minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem. Indeed, the Government has not convinced us that it is a pervasive problem. Parents may have little concern that the adult channels be blocked.

The second problem with the Government's argument that the 0.5% statistic proves that § 504 is ineffective is that the argument is premised on adequate notice to subscribers. It is not clear, however, from the record that notices of the provisions of § 504 have been adequate.

In the interest of ensuring that adequate notice be given in the future, we suggest that it be given along the following lines: MSOs should communicate to their subscribers the information that certain channels broadcast sexually-oriented programming; that signal bleed, *i.e.*, partially discernible video images and full

audio of those channels, may appear; that children may view signal bleed without their parents' knowledge or permission; that channel blocking devices that will block signal bleed are available free of charge from the subscriber's MSO; and that a request for a free device to block the offending channel can be made by a telephone call to the MSO.

The adequacy of the notice will also depend on the means by which it is made. Appropriate means would include inserts in monthly billing statements, Barker channels (preview channels of programming coming up on Pay-Per-View), and on-air advertisement on channels other than the one broadcasting the sexually explicit programming. In addition, the notice should be conveyed on a regular basis, at reasonable intervals. Moreover, if an MSO were to change the channel on which it broadcasts sexually explicit programming, a special notice indicating this should be mailed to subscribers who have requested a lockbox.

The efficacy of § 504 with "adequate notice" must be compared to that of § 505. The time channeling requirement of § 505 ensures that during the hours when children are likely to be watching television, signal bleed cannot occur. We note, however, that a resourceful minor can still watch signal bleed after the safe-harbour hours. By contrast, § 504 depends on parental vigilance. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73-74, 103 S. Ct. 2875, 77 L.Ed.2d 469 (1983) (parental discretion controlling access to unsolicited contraceptive advertisements in the home is the preferred method of dealing with such material). However, with adequate notice of the issue of signal bleed, parents can decide for themselves whether it is a problem. Thus to any parent for whom signal bleed is a

concern, § 504, along with “adequate notice,” is an effective solution. In reality, § 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights.

We hold therefore that § 504 is a less restrictive alternative to § 505 as long as MSOs provide “adequate notice” to their subscribers. We do not have jurisdiction over the MSOs to require them to provide such notice. We do, however, have jurisdiction over Playboy. As a consequence, we will require Playboy in its contractual arrangements with MSOs to ensure that MSOs provide “adequate notice” of the availability of § 504 blocking devices. If “adequate notice” is not provided, § 504 will no longer be a viable alternative to § 505.

To be sure, MSOs retain the right not to broadcast sexually explicit programming, if, for example, it proves not to be economically feasible. Playboy, however, as well as other providers of sexually explicit programming, will have the incentive to ensure the economic feasibility of lockbox distribution by MSOs.

Under § 504, the Government is undoubtedly correct that some minors will find access to signal bleed from sexually explicit programming if they are determined to do so. As the Supreme Court explained in the context of dial-a-porn regulations, “[i]t may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access the dial-a-porn system.” *Sable Communications*, 492 U.S. at 130, 109 S. Ct. 2829. Nonetheless, the Court did not deem the desire to prevent “a few of the most enterprising and disobedient young people,” from securing access to the pornography, to justify a statutory provision that had the

“invalid effect of limiting the content of adult telephone conversations to that which is suitable for children.” *Id.* at 2839; see *Fabulous Associates*, 896 F.2d at 788. Similarly, § 504 with “adequate notice” is not a perfect solution; but neither is § 505. We have balanced the rights of Playboy and of its subscribers against the interest of the government in regulating sexually explicit programming. We find the balance struck by § 504 with “adequate notice” to be a less restrictive alternative to that provided by § 505. For this reason, we declare § 505 unconstitutional and enjoin its enforcement.²⁴

²⁴ As we find § 505 unconstitutional on First Amendment grounds, we do not reach the merits of the other claims put forward by Playboy, that § 505 is unconstitutionally vague and that § 505 violates the Equal Protection guarantee of the Fifth Amendment.

APPENDIX B

UNITED STATES DISTRICT COURT
D. DELAWARE

Civil Action Nos. 96-94, 96-107-JJF

PLAYBOY ENTERTAINMENT GROUP, INC.,
AND GRAFF-PAY-PER-VIEW INC., PLAINTIFFS*v.*UNITED STATES OF AMERICA, UNITED STATES
DEPARTMENT OF JUSTICE JANET RENO,
ATTORNEY GENERAL, AND THE FEDERAL
COMMUNICATIONS COMMISSION, DEFENDANTS

[Filed: Nov. 8, 1996]

OPINION

Before: ROTH¹, Circuit Judge, FARNAN² and
SIMANDLE³, District Judges.

ROTH, Circuit Judge:

The plaintiffs in this action, Playboy Entertainment
Group, Inc. ("Playboy") and Graff Pay-Per-View
("Graff"), challenge the constitutionality of section 505¹ Judge Jane R. Roth, United States Circuit Court Judge for
the Third Circuit.² Judge Joseph J. Farnan, United States District Court Judge
for the District of Delaware.³ Judge Jerome B. Simandle, United States District Court
Judge for the District of New Jersey.

of the Communications Decency Act of 1996 ("the CDA" of "the Act"), which is Title V of the Telecommunications Act of 1996, Pub.L. No. 104- 104, 110 Stat. 56. Congress enacted section 505 in an effort to eliminate signal bleed, *i.e.*, the partial reception of sexually explicit adult cable television programming in the homes of non-subscribers to that programming.

Most cable television systems in the United States offer one or more optional premium channels dedicated to sexually oriented programming. However, of the 62 million households that subscribe to cable television, only about 3 million will purchase or subscribe to adult programming during the course of a year. Cable system operators attempt to block non-subscribers from receiving this programming by various scrambling techniques which we will explain in greater detail in our Findings of Fact. Signal bleed occurs when the scrambling process is not fully successful.

The stated purpose of section 505 is to protect children from signal bleed. Section 505(a) requires a cable television operator to completely scramble or block the video and audio portions of any cable channel that is primarily dedicated to sexually explicit programming. If a cable operator is unable to comply in full with section 505(a), then section 505(b) requires "time channeling", *i.e.*, that sexually explicit adult programming be transmitted only during those hours when children are not likely to view it. The Federal Communications Commission has determined these "safe harbor" hours to be from 10:00 p.m. to 6:00 a.m.

The principal issue facing us is whether government regulation of signal bleed from sexually explicit programming offends the free speech and equal protection rights of adult-programming networks and of their

subscriber audience. Our analysis is narrowed by the fact that plaintiffs do not contend that signal bleed itself is protected speech. Moreover, plaintiffs concede that their programming is essentially 100% sexually oriented, in contrast to other entertainment channels that display only occasional or sporadic sexually explicit scenes or programs. Nevertheless, because the regulatory scheme of section 505 impacts on the transmission of adult programming, which is entitled to First Amendment protection,⁴ we will examine whether section 505 is a content-based restriction of speech, and, if so, whether it survives scrutiny by addressing a compelling interest and by being narrowly tailored for that end. We will also consider whether Congress has unconstitutionally singled out networks that are exclusively dedicated to sexually oriented programming, while not regulating signal bleed from other premium networks that at times will transmit sexually oriented programs or scenes. Finally, we will examine plaintiffs' claim that the language of section 505 is unconstitutionally vague.

⁴ We recognize at the outset that the programming on plaintiffs' sexually dedicated channels is indecent, meaning vulgar or offensively explicit sexual material not generally available for viewing by children, but that it is not obscene. Indecent speech is subject to constitutional protection because it is established that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836-37, 106 L.Ed.2d 93 (1989); *Fabulous Associates Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 783 (3d Cir. 1990); *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc), cert. denied, — U.S. —, 116 S. Ct. 701, 133 L.Ed.2d 658 (1996); accord, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), at 851 (Sloviter, J.), at 858 n.3 (Buckwalter, J.), and at 865-66 (Dalzell, J.).

I.

PROCEDURAL BACKGROUND

President Clinton signed the CDA into law on February 8, 1996. On February 26, Playboy filed this action in the United States District Court for the District of Delaware, seeking a declaratory judgment that § 505 violates the First Amendment and the Equal Protection Clause of the Fifth Amendment of the U.S. Constitution. In addition, Playboy sought injunctive relief that would prohibit enforcement of § 505 by the Government.⁵ Graff subsequently filed an action seeking identical relief against the same defendants. On March 4, 1996, Judge Farnan granted Graff's motion to consolidate these actions pursuant to Federal Rule of Civil Procedure 42(a). That same day, Chief Judge Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit granted the parties' request to appoint a three-judge district court pursuant to § 561(a) of the CDA. She named Judge Joseph P. Farnan of the U.S. District Court for the District of Delaware, Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey, and Judge Jane R. Roth of the U.S. Court of Appeals for the Third Circuit.⁶

⁵ The defendants in this action are the United States; the United States Department of Justice; Attorney General of the United States, Janet Reno; and the Federal Communications Commission ("the FCC"). To simplify matters, we will refer to these defendants jointly as "the Government."

⁶ Section 561(a) of the CDA provides that a three judge district court shall be convened to decide "any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title . . . pursuant to the provisions of section 2284 of title 28, United States Code." Pub.L. No. 104-104, § 561(a), 110 Stat. 56, 142 (1996). Section 2284 requires that at least one of the judges appointed to serve on the three-judge panel be a circuit judge.

Because the CDA was to go into effect on March 9, 1996,⁷ Playboy requested a temporary restraining order ("TRO") to enjoin implementation and enforcement of § 505 of the Act. On March 6, 1996, Judge Farnan heard oral argument on Playboy's TRO motion.⁸ He granted Playboy's motion on March 7, 1996, temporarily enjoining enforcement of § 505 until the matter could be heard by the three judge panel appointed by Chief Judge Sloviter. *Playboy Entertainment Group, Inc. v. United States*, 918 F. Supp. 813 (D. Del. 1996).

In preparation for our consideration of the plaintiffs' Application for a Preliminary Injunction, the parties negotiated a mutually acceptable discovery and briefing schedule. Much of the factual and technical evidence was presented by affidavits and briefs submitted prior to the preliminary injunction hearing. We heard testimony on May 20 and May 21, 1996, and closing arguments were presented on May 22. We concluded that

⁷ Pursuant to § 505(b), section 505 was set to go into effect on March 9, 1996, thirty days after it was signed into law by the President. Pub.L. No. 104-104, § 505(b), 110 Stat. 56, 136 (1996).

⁸ Section 2284(b)(3) delineates the preliminary matters that may be decided by a single judge from those matters that must be decided by three-judge district courts. That section provides:

A single judge may . . . grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by

the district court of three judges of an application for a preliminary injunction. A single judge shall not . . . hear and determine any application for a preliminary or permanent injunction. . . . Any action of a single judge may be reviewed by the full court at any time before final judgment.

28 U.S.C. § 2284.

we should delay our decision until after the Supreme Court's decision in *Alliance for Community Media v. F.C.C.*, 56 F.3d 105 (D.C. Cir. 1995). The Supreme Court published its decision on June 28, 1996, *sub nom.*, *Denver Area Educational Telecommunications Consortium v. F.C.C.*, — U.S. —, 116 S. Ct. 2374, 135 L.Ed.2d 888 (1996). The parties then submitted supplemental memoranda, as we had instructed, on the impact and applicability of the Supreme Court's decision.

II.

FINDINGS OF FACT

In order to understand fully the arguments made by the parties in this case, it is necessary to understand the technological workings of cable signals and transmission. During the preliminary injunction hearing, the court heard extensive and complex testimony regarding cable technology and the mechanisms available to comply with § 505. Pursuant to Federal Rule of Civil Procedure 52(a), we make the following findings of fact:

The Statute At Issue

1. Playboy and Graff challenge § 505 of the CDA, entitled "Scrambling of Sexually Explicit Adult Video Service Programming." This section requires a multi-system operator ("MSO")⁹ to scramble "sexually explicit adult programming or other programming that is indecent" which is transmitted on a channel "primarily dedicated to sexually oriented programming." Section 505 requires that any such adult channel or network be

⁹ Section 505 applies to "multichannel video programming distributors." These distributors are more simply known as "multisystem operators" or "MSOs" and we will refer to them in this manner.

fully scrambled. The purpose of this scrambling is to eliminate "signal bleed." "Signal bleed" is the partial reception of video images and/or audio sounds on a scrambled channel. If an MSO does not or cannot comply with § 505's blocking requirement, the MSO is prohibited from transmitting the adult programming during hours of the day when minors are most likely to view it.¹⁰

2. MSOs, such as Telecommunication, Inc. ("TCI") and Time Warner Cable, provide cable subscribers with various packages of cable channels for which subscribers pay a monthly fee. Some subscribers receive a "basic" package or "tier" of channels. A basic cable tier often includes local broadcast networks (like ABC,

¹⁰ Section 505 provides:

(a) REQUIREMENT.—In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video

programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) IMPLEMENTATION.—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

Pub.L. No. 104-104, § 505, 110 Stat. 56, 136 (1996) (to be codified at 47 U.S.C. § 561).

CBS, and NBC), leased and public access channels, as well as networks devoted entirely to news, education, fine arts, music videos, sports, or shopping. MSOs also provide "premium" tiers, which offer, in addition to the basic tier channels, channels showing recently released movies (like HBO, Cinemax, and Showtime) and channels dedicated solely to adult entertainment. MSOs charge a monthly fee for a basic cable package and additional monthly fees for premium cable channels.

3. Premium programming is also offered by MSOs on a "pay-per-view" basis. A pay-per-view consumer places an order with a cable operator, requesting access to a particular movie or sporting event. A consumer may also purchase programming on a premium channel for a specified period of time. When a consumer places a pay-per-view order, the MSO at the beginning of the requested program unscrambles the signal by remote accessing of a converter/descrambler box in the subscriber's home. The MSO rescrambles the signal at the conclusion of the program. The fee charged for receiving a program on a pay-per-view basis is always in addition to monthly fees paid for a cable package.

4. Playboy and Graff provide MSOs with adult, sexually oriented video programming. The MSOs then transmit the plaintiffs' programming to premium subscribers and pay-per-view purchasers who request access to such programming. Playboy owns two adult-programming networks: Playboy Television and AdultTVision. Graff also owns two adult networks: Adam & Eve and Spice. The programming on the Playboy and Graff networks is virtually 100% sexually explicit adult programming. In marketing its programming, Playboy relies on both premium subscription and pay-per-view sales, while Graff relies almost entirely on pay-per-

view. On a yearly basis, 3 million households subscribe to and/or receive pay-per-view sexually explicit adult programming.

5. Other non-adult premium networks have obtained licenses to exhibit particular Playboy films. In addition, non-adult premium and basic cable channels will, among other programs, transmit sexually explicit programs or programs which contain some sexually explicit scenes. We received evidence of the frequency of sexually explicit programming on non-adult channels. It was demonstrated for example that the number of sexually explicit programs available on non-adult channels on the evening of Friday, May 17, 1996, in Denver, Colorado, was one sixteenth that shown on the plaintiffs' adult channels. Moreover, unlike the adult channels, the sexually explicit programs on non-adult channels were mainly "R" rated movies which contained some sexually explicit scenes but were not continuously sexually explicit as was plaintiffs' programming.

6. MSOs receive signals from many sources, such as master antennas, satellites, and local television stations. The signals are received at the system transmitter or "headend" where they are amplified and retransmitted by coaxial cable. Cable subscribers receive the channels directly by cable, if they own a cable-ready television, or by attaching the cable to a converter box if they own a non-cable-ready television.¹¹

¹¹ A converter box sits on top of an older model television set which can receive only a finite number of VHF or UHF channels. The converter takes the cable signal and converts it to a channel which can be received by the subscriber's television set. When cable systems began to offer programming, other than local broadcast stations, on channels that television sets designed for broadcast reception were not capable of receiving, MSOs began to

7. Because the cost of premium and pay-per-view programming is in addition to the cost of basic programming, MSOs seek to secure premium network signals for subscribers only. To prevent a signal from reaching the home of a non-subscriber, MSOs "scramble" the signal by blocking a portion of it. Currently, most MSOs scramble premium channel signals using either "RF" or "baseband" technology. Generally, this scrambling affects only the video portion of the transmission.¹²

8. When a consumer decides to subscribe to a premium or pay-per-view channel, the MSO must descramble the channel for the new subscriber. This can be done either by installing a positive or negative trap in the coaxial cable leading to the new subscriber's home or by providing the new subscriber with an addressable converter. The trap or the addressable converter descrambles the signal so that the integrity of the image

distribute these converter boxes to their subscribers. Converter boxes are electronic channel selectors. They are connected both to the subscriber's TV set and to the MSO's cable line. When a subscriber chooses a cable channel to view, the box "converts" the selected channel to a frequency (typically broadcast television channel three or four) that the subscriber's TV set can receive and display.

In about 1980, TV set manufacturers began marketing "cable-ready" TV sets, units equipped with tuners capable of directly receiving cable programming transmitted on non-broadcast (cable only) frequencies. If a subscriber has a cable-ready TV set, and it is capable of tuning all the channels offered by the cable system, the subscriber's line can be connected directly to the TV set.

¹² Because RF affects only the picture portion of the television transmission, no audio scrambling occurs. Some baseband systems do include audio encryption so that no intelligible audio will be presented to the non-subscribing customers.

and/or the sound is restored in the set or sets attached to the descrambled line. The MSO can remotely "address" an addressable converter by sending out an electrical impulse. Addressable converters make pay-per-view requests possible by enabling an MSO by remote direction to descramble and then rescrumble the cable signals entering the subscriber's home.¹³

9. As mentioned above, one of the technologies used by MSOs to secure premium channels is "positive trapping." For positive trapping, the MSO installs at its transmitter headend an electronic box which jams the signal of the channel to be secured. Non-subscribers to that channel will receive only "snow" for video and a high-pitched beep for audio. Subscribers to the jammed channel receive a metal cylinder, the positive trap, which is attached to the cable-ready TV or to the set top converter box in order to filter out the jamming signal.

10. A premium channel's signal can also be secured by "negative trapping." Using this technology, the signal will be transmitted in the clear. A negative trap is installed at the homes of non-subscribers, jamming the signal there.

11. An MSO's choice between using positive or negative trapping will depend on whether the majority of subscribers to the overall cable service also wish to subscribe to a particular premium service. It is cost effective to use negative traps only when a large majority of the customers of a cable system subscribe to a particular premium channel.

¹³ The previously described converter box and the addressable converter/descrambler can be combined in one set top box.

12. The problem which § 505 was enacted to remedy is known as "signal bleed." Audio or video "bleed" occurs when a signal is not effectively scrambled by the MSO's RF or baseband equipment. Bleeding does not occur in TV sets with converter boxes that have a feature known as channel mapping.¹⁴ Cable-ready television sets, however, do not include this mapping feature. When a consumer with a cable-ready TV tunes to a scrambled premium channel to which the consumer does not subscribe, the consumer receives the jammed signal which under some circumstances includes a video picture or portions of a picture because of a phenomenon called random lockup. The non-subscribing consumer will also receive a clear audio signal unless the MSO's scrambling system is one which scrambles the audio.¹⁵ The severity of this signal bleeding problem varies from time to time and from place to place. The reason for these inconsistencies may be weather extremes, faulty or old equipment, or human error in installing, operating, and/or maintaining systems. Moreover, according to plaintiffs' expert, Dr. Walter Ciciora, the cable-ready TV's that pervade the market today have improved electronic circuitry which will make a discernible picture out of a partly-scrambled signal. This technology, developed over the past two decades, permits the child of a cable subscriber to tune the cable-ready TV to a premium or pay-per-view channel offered on the cable system and to receive discerni-

¹⁴ When a consumer with a converter box attempts to tune a scrambled channel, the converter box will not tune that channel but will tune to another channel, providing either a promotional message or a blue screen.

¹⁵ A subscriber will of course receive the descrambled video and audio.

ble images even though the parent is a non-subscriber to that channel.

13. With this incidence of improved electronic technology and/or partially scrambled signals, a non-subscriber may see and hear portions of a channel or program to which he or she does not subscribe. This result is of particular concern when the programming is sexually explicit, intended for an adult-only audience. Families, who do not subscribe to adult entertainment channels, have found that sounds and images from these channels are at least partially discernible. The government presented anecdotal evidence of parents discovering that their children have been exposed to sights and sounds from sexually explicit programming only after the exposure had occurred. This evidence included affidavits from several parents testifying about the danger in their homes of signal bleed from adult programming networks. Other parents complained that, even though their own sets were attached to lockboxes that fully blocked indecent programs, their children were exposed to signal bleed from adult programming when they visited friends. Anecdotal evidence of signal bleed was also presented in letters which had been sent to various members of Congress and were made part of the record before this court. In addition, video tapes of sexually explicit signal bleed were admitted into evidence. For instance, Defendant's Exhibit No. 4 was taped from the Playboy Channel in Orange, California. Exhibit No. 4 shows partially scrambled images of a nude woman caressing herself and then of two nude women in the water and in a boat, caressing each other. Defendant's Exhibit No. 5 is an audio tape of the Spice Channel, made by a non-Spice subscriber from the audio bleed. It carries the sounds of

what appear to be repeated sexual encounters accompanied by assorted orgasmic moans and groans.

14. There are approximately 62 million households in the United States which receive cable television. Of these, 20 to 25 million have converter boxes to receive basic and/or premium cable service. These converter boxes will map out the scrambled channels and as a consequence these households will not receive "signal bleed." The other 40 million cable subscribers have the potential for a "bleed" problem. It is not clear how many of these 40 million cable homes with the potential for "signal bleed" will not in fact receive signal bleed either because the local MSO employs effective base-band or digital scrambling or because the household is already a subscriber to the adult channels.¹⁶ No evidence was presented of any consumer desire to receive "signal bleed." Moreover, plaintiffs make no claim that "signal bleed" itself is constitutionally protected.

Legislative History of § 505

15. On June 12, 1995, after hearings and substantial debate had been held regarding the legislation that was to become the 1996 Telecommunications Act, Senator Diane Feinstein of California and Senator Trent Lott of Mississippi offered Amendment 1269 which ultimately became Section 505 of the Act. Their amendment proposed that MSOs, offering adult programming, should be required to completely scramble the audio and video

¹⁶ If at the trial on the permanent injunction more specific evidence of the number of households with the potential for signal bleed were to be presented, we would be in a better position to consider whether the standards for a permanent injunction have been met.

signals to prevent partial reception of those channels in the homes of nonsubscribers.

16. Senator Feinstein told members of the Senate that “[p]arents . . . come home after work only to find their children sitting in front of the television watching or listening to the adult’s-only channel, a channel that many parents did not even know existed.” Cong. Rec. S8167; *see* Playboy Ex. 20. She noted that guidelines which put the burden on the subscriber to request complete scrambling of adult channels were inadequate because often nonsubscribers are unaware that indecent audio and/or video signals can be received. *Id.* The object of the amendment, she said, was to “protect [] children by prohibiting sexually explicit programming to those individuals who have not specifically requested such programming.”

17. Senators Feinstein and Lott each spoke briefly about their proposed amendment. 141 Cong. Rec. S8166-S8169. Accompanying the transcript of their statements before the Senate was a memorandum from the American Law Division (“ALD”) of the Congressional Research Service. The memorandum analyzed the Feinstein-Lott amendment in light of First Amendment case law and concluded that some language contained in the provision might be unconstitutional and over broad. *Id.* at S8168. Except for the statements of Senators Feinstein and Lott, there was no debate on the amendment and no hearings were held on it. The amendment passed easily in the Senate (91 votes in favor; none opposed) and became § 505 of the bill that emerged from the conference which ironed out the differences between the House and Senate versions. On February 8, 1996, President Clinton signed the bill into law.

18. Section 505 does not eliminate adult programming. Instead, it offers MSOs either the option of fully scrambling the video and audio signals of adult programming or, if complete scrambling is not possible or is not the choice of the MSO, the option of transmitting adult programs only during the “safe harbor” hours. Specifically, pursuant to § 505(a) (47 U.S.C. § 561(a)), MSOs are required to “fully block the video and audio portion of [an adult entertainment] channel so that one not a subscriber to such channel or programming does not receive it.” If an operator cannot fully block its adult channels, it must then, pursuant to § 505(a) (47 U.S.C. § 561(b)), discontinue programming “during the hours of the day . . . when a significant number of children are likely to view it.” The FCC regulation implementing this alternative would limit adult programming to the eight hour period between 10:00 p.m. and 6:00 a.m. We will refer to the requirement found in subsection (a) as “complete scrambling,” and the alternative offered by subsection (b), as “time channeling.”

The Technological and Economic Impacts of § 505

19. There are MSOs that already meet the requirements of § 505. For example, Steven Saril, Senior Vice President of Sales and Marketing for Graff, testified that roughly half of the systems carrying Graff programming are in compliance with § 505.¹⁷ For the MSOs that are not in compliance, several technologies may become available in the future that would allow an MSO to meet the requirements of § 505. Television

¹⁷ Saril also testified that the Spice network might go out of business if the non-complying channels were required to time channel. The Graff “standard agreement,” however, requires an MSO to carry Spice only during the hours of 9 p.m. to 3 a.m.—hours that are very close to the safe harbor time period.

manufacturers may soon be required by law to insert the so-called "v-chip," in all new televisions. Pub. L. No. 104-104, § 551, 110 Stat. at 139-41. The v-chip will allow parents to block types of programming which they find inappropriate for their children. The v-chip is currently being tested in Canadian markets. It is not clear, however, how long it will be before televisions with v-chips become widely available in the United States.

20. Digital cable technology is another future option that will permit MSOs to completely scramble signals to nonsubscribers as § 505 requires. Approximately 2 million American consumers presently receive digital television service. Digital signals will prevent all audio and video bleeding, but digital service will require conversion of the MSOs' headend equipment from analog to digital technology. As MSOs adopt digital service, they will probably use it first for premium channels, including adult programming.

21. Because the currently used "RF" and "base-band" technologies are not capable of fully scrambling both the audio and video signal at all times, many MSOs would be required, if § 505(a) was enforced today, to resort to other and/or additional scrambling techniques. If an MSO was not able or willing to initiate additional scrambling techniques, it would be required to time channel adult programming.

22. One device which has been available for several years and which succeeds in fully scrambling unwanted cable signals is the lockbox. Since the early 1980s, MSOs have been required by law to provide a lockbox to any customer upon request. Section 544(d) of the 1984 Cable Act requires that cable operators either sell or lease a blocking device to any subscriber who

requests that a channel be completely blocked. See 47 U.S.C. § 544(d)(2)(A). However, few households have obtained the lockboxes made available by this provision.

23. Section 504 of the CDA also requires MSOs to completely block *upon request* any programming that a cable customer finds personally offensive. This blocking requirement is not limited to the "sexually explicit adult video service programming" which is the target of § 505. Pub. L. No. 104-104, § 504, 110 Stat. 56, 136 (1996). Moreover, under § 504, the MSO, rather than the subscriber, is responsible for bearing the cost of providing the blocking mechanism.¹⁸ Despite this economic burden, plaintiffs suggest that § 504 presents a constitutional, "less restrictive alternative" because it would require an MSO to provide complete blocking only upon request. Plaintiffs also assert that cable subscribers can be alerted through public relations efforts that blocking devices will be made available to them, free of charge, upon request. Methods of disseminating this information could include inserts in program guides and bills, informative screens shown on "barker channels", advertisements run on other channels, and special mailings. We have not, however, received evidence that MSOs are advising cable customers of the availability of the free channel blocks

¹⁸ Section 504(a) provides:

(a) SUBSCRIBER REQUEST.—Upon request by a cable service subscriber, a cable operator shall, *without charge*, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

Pub. L. No. 104-104, § 504, 110 Stat. 56, 136 (1996) (emphasis added).

under § 504. Nor is there evidence that customers are responding to such notices, if given. Thus, we cannot effectively assess plaintiffs' claim that § 504 is likely to become a viable remedy for eliminating signal bleed. If the § 504 blocking option is not being promoted, it cannot become a meaningful alternative to the provisions of § 505. At the time of the permanent injunction hearing, further evidence of the actual and predicted impact and efficacy of § 504 would be helpful to us.

24. MSOs that adopted the lockbox remedy, in order to comply with § 505, would be required to provide *all* nonsubscribers with a lockbox programmed to block the audio and video signals of adult entertainment networks. A mapping converter with a lockbox feature allows parents to control when adult programming will be received and when it will be blocked. Most lockboxes currently available are capable of blocking only signals entering the television set to which the box is attached. In order to fully block access to sexually oriented programming at all times, each cable-connected TV set in the home would have to be connected to a lockbox. A single converter/lockbox costs approximately \$115. If MSOs that offer adult programming were to distribute one converter/lockbox to every nonsubscribing household currently without one, the total cost would be prohibitive, probably in excess of one billion dollars.

25. In the alternative, MSOs could provide "negative traps" to nonsubscribers. A "negative trap" is installed on the cable wiring of non-subscribing households and scrambles a clear signal. Subscribers to adult channels receive the clear signal without the negative trap. Negative trapping costs between \$12 and \$15 per household. It is an economically feasible solution only

in areas, such as military bases, where a large majority of cable subscribers want to receive the adult channel.

26. Double scrambling with "positive trap" technology provides the most workable alternative or non-complying MSOs. To achieve double scrambling, RF or baseband scrambling is combined with a jamming signal at the headend. The headend jamming completely blocks video and audio so that no signal bleed occurs in the homes of non-subscribers. In order for a subscriber to view programming that has been double scrambled, the subscriber needs both a positive trap and an addressable converter. The positive trap filters out the interference from the jamming signal, and the addressable converter descrambles the RF or baseband scrambling. The addressable converter can be used to start up and end periods of premium service and also to permit pay-per-view reception. Positive trap technology would be economically advantageous in areas where nonsubscribers outnumber subscribers. If the positive trapping alternative were adopted by an MSO, positive traps would be delivered to or installed at all households subscribing to adult programming. The average cost of a positive trap is \$7. A positive trap is easily installed by the subscriber or it can be installed by the MSO at a cost of approximately \$35. The cost of the additional equipment necessary for jamming at the MSO's headend is estimated to be \$750 to \$1,000.

27. Positive trapping technology poses an additional problem for pay-per-view purchases. Customers either have to pick up a positive trap or order it in advance of viewing the desired program. This interferes with the spontaneous nature of what plaintiffs consider to be the

impulse purchasing of sexually explicit adult programming.

28. Professional installation of traps also raises privacy concerns. A subscriber, who enjoys adult entertainment at home, might be dissuaded from requesting a positive trap upon realizing that the MSO will learn his or her identity. The new subscriber will be identified as a consumer of sexually explicit material—although with sexually explicit premium and pay-per-view programming, the subscriber will also be identifiable through billing for the programming.

29. A few MSOs have already adopted “double scrambling” to resolve community opposition to sexually explicit programming and to the audio and/or video bleeding of signals from such programming. Plaintiffs contend that in these double-scrambling communities revenues from adult channels has fallen by fifty per cent. Plaintiffs are of the opinion that a significant factor causing this drop in revenue is the impulse nature of the purchase of adult programming.

30. Finally, an MSO has the option of complying with § 505 by “time channeling” as provided in subsection (b). If an MSO cannot or chooses not to completely scramble audio and/or video signals as required by § 505(a), it must restrict adult program to certain “safe harbor” hours. In preparation for implementing § 505, the FCC established a regulation that defines the safe harbor hours as the eight hour period between 10:00 p.m. and 6:00 a.m. *In re Implementation of Section 505 of the Telecommunications Act of 1996*, CS Dkt. No. 96-40, FCC 96-84, Order & Notice of Proposed Rulemaking amending 47 C.F.R. § 76 ¶ 6 (released March 5, 1996; intended to become effective March 9,

1996). If time channeling were adopted by an MSO, adult cable programming would not be available in the MSO’s service area except during the safe harbor hours. Plaintiffs estimate that their revenues would fall approximately thirty per cent if time channeling were adopted.¹⁹

31. The MSOs that have taken a position on the method by which they would comply with § 505 have all announced that they would adopt time channeling.

III.

CONCLUSIONS OF LAW

A. The Preliminary Injunction Standard

Playboy and Graff have asked this court to exercise extraordinary judicial authority by striking down a law drafted and adopted by a co-equal branch of govern-

¹⁹ We are skeptical of plaintiffs’ estimate of revenue loss. It appears to be significantly overstated. Although Graff’s Vice President, Steven Saril, stated that 30 percent of those who purchase his company’s programming do so outside the safe harbor hours, many of these customers may not be affected by time channeling because half of the cable systems, carrying Graff channels, already comply with § 505(a). The customers of these MSOs will still be able to view Graff’s channels outside the safe harbor period. Moreover, Saril admitted on cross-examination that 21% of the non-safe-harbor purchases occur at 9:00 or 9:30 p.m., and that a 10:00 p.m. starting time would cause no loss of revenue. He further admitted that people may rearrange their viewing schedule or use a VCR to tape adult programming during the safe harbor hours, again preserving Graff’s revenues. Finally, plaintiffs acknowledge some remaining elasticity in the pricing of sexually explicit programming. Graff would be able raise its rates a certain extent without losing customers.

ment. The plaintiffs' request raises one of the judiciary's most "awesome responsibilit[ies] calling for the utmost circumspection in its exercise." *Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 2, 13 L.Ed.2d 12 (1964). After thorough examination and discussion, we conclude that, at this preliminary injunction stage, we will not strike down § 505. As the case has presently been developed before us, the plaintiffs have not met the requirements for the issuing of a preliminary injunction. We will, therefore, deny their petition for preliminary relief.

The standard used to determine whether plaintiffs are entitled to a preliminary injunction is well established. In order to succeed, plaintiffs must demonstrate that they are likely to prevail on the merits and that they will suffer irreparable harm if they are not granted injunctive relief. We must also consider whether the potential harm to the defendant that will result from the issuing of a preliminary injunction outweighs the harm that may fall upon the plaintiffs if such relief is denied, and whether granting the requested injunctive relief is in the public interest. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) (citing *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 90-91 (3d Cir. 1992) and *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175 (3d Cir. 1990)); see also *Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995).

In a case such as this one, in which the alleged injury is a threat to First Amendment interests, the finding of irreparable injury is often tied to the likelihood of success on the merits. *American Civil Liberties Union*, 929 F. Supp. at 851 (citing *Elrod v. Burns*, 427 U.S. 347,

96 S. Ct. 2673, 49 L.Ed.2d 547 (1976)). The loss of First Amendment freedoms is unquestionably irreparable injury. *Elrod*, 427 U.S. at 373, 96 S. Ct. at 2689-90 (citing *New York Times Co. v. United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L.Ed.2d 822 (1971)). Conversely, however, if the only irreparable injury alleged is the loss of first amendment freedoms, the likelihood that plaintiffs will not succeed on the merits creates an equal likelihood that they will not suffer First Amendment injury.²⁰ Constitutional injury cannot occur if there is not a constitutional violation. We will, for this reason, turn our inquiry first to the issue of the plaintiffs' likelihood of success on the merits.

Plaintiffs challenge § 505 on grounds that it (1) infringes the free speech protections provided by the First Amendment of the U.S. Constitution, (2) violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, and (3) contains unconstitutionally vague terminology. With regard to all three of these claims, we conclude that Playboy and Graff have failed to meet the preliminary injunction test. They have not persuaded us that they are likely to prevail on the merits if any of these three claims are

²⁰ Plaintiffs also claim that they will suffer financial loss. Financial loss is not, however, the type of irreparable injury that warrants the granting of injunctive relief. See, e.g., *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1145 (3d Cir. 1982). To the extent that plaintiffs may suffer financial loss for which they will not be reimbursed, that economic burden is an element which we considered *infra* in the balancing of harms, particularly in our discussion of the benefit to the public of time channeling (per *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978)) and its availability under § 505 as an alternative to complete scrambling.

ultimately litigated. Moreover, they have not demonstrated that the public interest is served by permitting signal bleed to invade nonsubscribers' homes, particularly in view of our interest in protecting children from a pervasive medium which transmits sexually explicit sounds and images and in view of the continuing availability under § 505 of sexually explicit adult programming during the safe harbor hours.²¹

B. First Amendment Jurisprudence

Playboy and Graff claim that § 505 burdens their rights guaranteed under the First Amendment by inhibiting their freedom of speech. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court has been exacting in its protection of this First Amendment right. Moreover, as circumstances and technologies have changed, the Court has adapted free speech protection to meet these changes.

We postponed our decision here until the Supreme Court reached its decision in a case dealing with a similar field of developing technology—that of leased and public access cable channels. *See Denver Area*

²¹ In our discussion, we do not separate out the elements to consider with regard to the issuing of an injunction, i.e., likelihood of success on the merits, irreparable harm, balancing of harms, and public interest. First, in this context of a claim of unconstitutional restriction of free speech, the harm and public interest elements are important factors in determining the likelihood of success on the merits. These factors will therefore be discussed in conjunction with the merits of the claims. Second, as we note above, our irreparable harm analysis is subsumed by our finding that plaintiffs are not likely to succeed on the merits.

Educational Telecommunications Consortium, Inc. v. F.C.C., — U.S. —, 116 S. Ct. 2374, 135 L.Ed.2d 888 (1996) [hereinafter *Denver Consortium*]. In *Denver Consortium*, the plaintiffs challenged three sections of the Cable Television Consumer Protection and Competition Act of 1992, which placed restrictions upon indecent programming aired on leased and public access cable channels.²² Pub. L. No. 102-385, 106 Stat. 1460,

²² The plaintiffs in *Denver Consortium* challenged Sections 10(a), 10(b), and 10(c) of the 1992 Cable Act. These provisions were to be applied to "leased access channels" and "public, educational, or governmental channels" ("PEG channels"). Section 10(a) "permit[s] a cable operator to enforce prospectively a written and published policy of prohibiting programming [on leased access channels] that the operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Cable Act, § 10(a)(2).

Section 10(b) requires that, if cable operators choose not to ban sexually explicit programming as permitted under § 10(a), when they broadcast such programming on leased access channels, they must completely segregate and block the signal carrying the indecent programming. 1992 Cable Act, § 10(b). According to regulations promulgated pursuant to § 10(b), leased access programmers must inform cable operators if their programming will be indecent, and cable operators must then place that programming on a single channel. 47 C.F.R. § 76.701(d) (1995). The signal of this single channel must be completely blocked by the cable operator, and unscrambled only upon the written request of an adult subscriber. *Id.* at § 76.701(b). Upon receiving a subscriber's request, the operator must provide access to the blocked channel within thirty days and, if that subscriber later asks that the channel be re-blocked, the operator must accommodate the subscribers request, again within 30 days. *Id.* at § 76.701(c).

Section 10(c) is similar to § 10(a) but applies only to PEG channels. It instructs the F.C.C. to enact regulations that would permit a cable operator "to prohibit the use, on [a cable system], of any channel capacity of any public, educational, or governmental

1486, § § 10(a), 10(b), and 10(c) (codified at 47 U.S.C. §§ 532(h), 532(j), and note following § 531) ("the 1992 Cable Act"). A majority of the Supreme Court agreed that § 10(b) of the 1992 Cable Act was unconstitutional, but the Court was unable to form a majority regarding the constitutionality of the remainder of the Act.²³

Justice Breyer wrote for the Court regarding § 10(b), but thereafter he wrote for a plurality, which upheld § 10(a) and struck down § 10(c). One of the seemingly unresolved aspects of *Denver Consortium* is the standard of scrutiny we should apply in our analysis here. The plurality suggested that it was "unwise and unnecessary" to decide whether a lower standard of scrutiny, such as that applied in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978), should apply in the cable context. *Denver Consortium*, — U.S. at —, 116 S. Ct. at 2385. It was unnecessary to specify a specific standard because § 10(b) could not pass constitutional muster either under strict scrutiny or under a less rigorous standard. And, it was unwise to declare a "rigid single standard" for fear of dampening the rapid rate of development in the field of communications technologies.

access facility for any programming which contains obscene material, sexually explicit, conduct, or material soliciting or promoting unlawful conduct." 1992 Cable Act, § 10(c).

²³ Unlike leased and public access channels, the Graff and Playboy networks are commercial premium channels. The segregation of adult programming and the scrambling of adult channel signals, which concerned the Court in *Denver Consortium*, is, in the context of adult channels, a commercial decision which MSOs have made in order to limit access to those viewers who pay to subscribe to the adult channels.

The other five members of the Court suggested that strict scrutiny remained the applicable standard where a law restricted speech on the basis of its content. Thus, these members of the Court would have required that the law be "narrowly tailored" to achieve a "compelling" government interest in order to survive constitutional review. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia believed that all three challenged provisions of the 1992 Cable Act were constitutional and that even § 10(b) would survive strict scrutiny. *See id.* at —, — - — & —, 116 S. Ct. at 2422, 2428-29 & 2432 (Thomas, J., concurring in part and dissenting in part). Justice Kennedy, joined by Justice Ginsburg, would have held to the contrary that strict scrutiny was fatal to the challenged provisions and all three should be struck down. *See id.* at — - —, — - —, & —, 116 S. Ct. at 2405-07, 2416-17, & 2419 (Kennedy, J., concurring in part and dissenting in part). In the aftermath of the *Denver Consortium* decision, it is clear only that we should apply either strict scrutiny or something very close to strict scrutiny when a content-based law, applicable in the cable television context, is challenged on grounds that it violates the First Amendment.²⁴

²⁴ We recognize that several Supreme Court pluralities have suggested that sexually explicit material receives less protection under the First Amendment than, for example, artistically, politically, or scientifically valued forms of speech. For example, in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L.Ed.2d 310 (1976), a plurality of the Court explained:

[E]ven though we recognize the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly

However, whatever the standard of scrutiny, as Justice Breyer stated for the Court in *Denver Consortium*: "The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required." *Id.* at —, 116 S. Ct. at 2384.

The first step that the majority took in *Denver Consortium* was to scrutinize the statute to assure that it properly addressed "an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." *Id.* at —, 116 S. Ct. at 2385. The Court defined the problem as the protection of children from exposure to

different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment ["I disapprove of what you say, but I will defend to the death your right to say it."]. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification. . . .

Id. at 70-71, 96 S. Ct. at 2452. This plurality also noted that "[e]ven within the area of protected speech, a difference in content may require a different governmental response." *Id.* at 66, 96 S. Ct. at 2450. The plurality opinion in *Pacifica Foundation* similarly suggested that a lower standard of scrutiny may be appropriately applied in certain contexts when the content of the regulated material is offensive, vulgar, or shocking. See *Pacifica Foundation*, 438 U.S. at 744-48, 98 S. Ct. at 3037-40.

patently offensive depictions of sex. *Id.* It was to address this same problem that Congress enacted § 505.

Section 505 differs, however, from the statute at issue in *Denver Consortium* and from most statutes that are directed at speech or at the regulation of speech in that the target of § 505 is not the speech itself, i.e., sexually explicit adult programming. The target is signal bleed, a secondary effect of the transmission of that speech. Moreover, § 505 is directed at this secondary effect because signal bleed is intruding into the homes of television viewers who have chosen *not* to receive the underlying sexually explicit programming.

This focus of § 505 on a secondary effect of speech leads us to our next inquiry, whether § 505 is "content-based" or "content-neutral." See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S. Ct. 925, 928-29, 89 L.Ed.2d 29 (1986). As we have noted, in *Denver Consortium* five justices agreed that a content-based strict scrutiny standard should apply. We conclude here, but not without considerable deliberation, that § 505 should be treated as a content-based restriction on speech. Even though § 505 is aimed at the content-neutral objective of preventing signal bleed, the section applies only when signal bleed occurs during the transmission of "sexually explicit adult programming or other programming that is indecent." It does not apply when signal bleed occurs on other premium channel networks, like HBO or the Disney Channel. Thus, Congress targeted signal bleed based on its sexually explicit content, rendering § 505 a "content-based" restriction. We will therefore apply content-based analysis.

We must, however, also consider content in context. We cannot ignore the fact that the households that receive signal bleed have not subscribed to the adult channel which transmits the unwanted images and sounds. Nor can we ignore the fact that cable television is a means of communication which is pervasive and to which children are easily exposed. The Supreme Court has recognized that cable television is as accessible to children as over-the-air broadcasting, if not more so. *See Denver Consortium*, — U.S. at —, 116 S. Ct. at 2386.

Moreover, the Supreme Court in its consideration of freedom of speech under the First Amendment has recognized the need to protect children from sexually explicit material, particularly in the context of a pervasive medium. *See Denver Consortium*, — U.S. at —, 116 S. Ct. at 2386 (“[T]he provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material.”); *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836, 106 L.Ed.2d 93 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”); *New York v. Ferber*, 458 U.S. 747, 756-57, 102 S. Ct. 3348, 3354-55, 73 L.Ed.2d 1113 (1982) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’” (citation omitted)); *Fabulous Assocs. Inc. v. Pa. Pub. Util. Comm’n*, 896 F.2d 780, 787 (3d Cir. 1990) (“There is

little question that the interest of the state in shielding its youth from exposure to indecent materials is a compelling state interest.”).

Nor are the courts alone in finding that children should be protected from exposure to sexually explicit materials. In 1986, the Attorney General’s Commission on Pornography issued a final report that reached similar conclusions regarding the effects of “non-violent and non-degrading,” sexually explicit materials on children. The Commission explained:

Perhaps the most significant potential harm in this category exists with respect to children. We all agree that at least much, probably most, and maybe even all material in this category, regardless of whether it is harmful when used by adults only, is harmful when it falls into the hands of children. . . . We have no hesitancy in concluding that learning about sexuality from most of the material in this category is not the best way for children to learn about the subject. There are harms both to the children themselves and to notions of family control over a child’s introduction to sexuality if children learn about sex from the kinds of sexually explicit materials that constitute the bulk of this category of materials.

We have little doubt that much of this material does find its way into the hands of children, and to the extent that it does we all agree that it is harmful. We may disagree about the extent to which people should, as adults, be tolerated in engaging in sexual practices that differ from the norm, but we agree about the question of the desirability of exposing children to most of this material, and on

that our unanimous agreement is that it is undesirable.

U.S. Dept. of Justice, *Attorney General's Commission on Pornography*, July 1986, at 343-44 (Def.'s Ex. 80).²⁵

As a result, we conclude that § 505 clearly addresses a recognized "compelling interest," and it remains only for us to determine whether the provision is carefully tailored to serve that end. For the reasons that we now develop, and particularly on the basis of the Supreme Court's ruling in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978), we hold

²⁵ In considering harm to children, we have not relied on the study conducted by Government's expert witness, Dr. Diana M. Elliott, Ph.D. See Diana M. Elliott, *Children's Exposure to Pornography: Prevalence and Impact* (Def.'s Ex. 79). We understand, as she testified, that it would be unethical to expose children to pornography in order to test their reactions to sexually explicit material, but, for a number of reasons, we have concerns regarding the reliability of her methods and conclusions. Her results strike us as anecdotal and possibly misleading. Because the parties stipulated prior to the preliminary injunction hearing that all evidence submitted would be admissible, we did not consider the admissibility of her study under the rules established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993) and *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), *cert. denied*, — U.S. —, 115 S. Ct. 1253, 131 L.Ed.2d 134 (1995). Instead, the reliability concerns that the court had regarding Dr. Elliott's research were considered only in weighing the evidence. We ultimately decided that her research should not be given weight in coming to our present decision.

If plaintiffs plan to seek a hearing in order to request a permanent injunction before this panel, it would be helpful if the parties would provide the court with additional evidence demonstrating the effects of sexually explicit materials on children.

that Congress has adopted, at least in respect to § 505(b), a carefully tailored, and constitutional, solution.²⁶

In *Denver Consortium*, a plurality of the Supreme Court acknowledged that case's similarity to *Pacifica Foundation*, noting that, like the broadcast system at issue in *Pacifica Foundation*, "[c]able television systems . . . 'have established a uniquely pervasive presence in the lives of all Americans.'" *Denver Consortium*, — U.S. at —, 116 S. Ct. at 2386 (quoting *Pacifica Foundation*, 438 U.S. at 748, 98 S. Ct. at 3039-40). It was largely the pervasive nature of broadcast media that motivated the Court in *Pacifica Foundation* to uphold governmental restrictions placed on radio broadcasts of indecent material.

We wholeheartedly agree with the plurality's finding in *Denver Consortium* that cable television is now "uniquely pervasive." *Id.* The plurality also noted that

²⁶ The Supreme Court held in an earlier "secondary effects" decision, regarding the exposure of the unwilling viewer to nudity, that a city ordinance was invalid which barred the exhibition in drive-in theaters of motion pictures in which human male or female bare buttocks, human female bare breasts, or human bare pubic areas were shown if the motion picture was visible from any public street or public place. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). We find the present case distinguishable from *Erznoznik* in that it is not an occasional glimpse of a portion of nude anatomy which is visible in the signal bleed from adult channels, but instead it is an unbroken continuum of sexually explicit sounds and images, delivered without invitation to one's home rather than to passers-by on a public highway. We believe it is likely that if the Jacksonville ordinance at issue in *Erznoznik* had been directed solely at the display of 100% sexually explicit films which were visible from the public street and from private homes, the ordinance would have been held to be valid.

"[c]able television broadcasting . . . is as 'accessible to children' as over-the-air broadcasting if not more so."

Id. Justice Souter further explained:

[W]hile we have found cable television different from broadcast with respect to the factors justifying intrusive access requirements under the rule in *Red Lion* [*Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969)], see *Turner Broadcasting System, Inc. v. F.C.C.*, [512 U.S. 622, — - —, 114 S. Ct. 2445, 2456-57, 129 L.Ed.2d 497 (1994)] (finding that *Red Lion's* spectrum scarcity rationale had no application to cable), today's plurality opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, — are also present in the case of cable television.

Id. — U.S. at — - —, 116 S. Ct. at 2401-02 (Souter, J., concurring) (citation omitted).

There is no question that a commanding majority of households in this nation subscribe to cable programming. As a result of imperfect signal scrambling, millions of children then have potential access not only to indecent sounds, similar to those raising concern in *Pacifica Foundation*, but also to sexually explicit visual images. In the homes of families who do not subscribe to sex-dedicated networks, these images enter as an offensive pollutant. They invade the household and "confront[] the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica Foundation*, 438 U.S. at 748, 98 S. Ct. at 3040;

see also *Denver Consortium*, — U.S. at —, 116 S. Ct. at 2386 (plurality opinion).

In *Pacifica Foundation*, the Supreme Court found it undisputed that George Carlin's "Filthy Words" monologue was "vulgar," "offensive," and "shocking." 438 U.S. at 747, 98 S. Ct. at 3039. The Court noted that, in the right context, the speech deserved First Amendment protections, providing adult listeners with a right to find Carlin's observances funny and provocative, instead of vulgar and offensive. The Court therefore examined the context of the monologue, broadcast at 2 o'clock in the afternoon. It emphasized the ubiquitous nature of broadcast radio and recognized that airing Carlin's performance at the time "could have enlarged a child's vocabulary in an instant." *Id.* at 749, 98 S. Ct. at 3040.

Similarly, when cable signal bleed occurs, children may be exposed to the sights and sounds of sexually explicit films and other adult programming. Such programming has the potential to affect not only a child's vocabulary, but also his or her capacity for inappropriate conduct that is sexual in nature. We believe that the danger of prematurely exposing children to video and audio transmissions of graphic adult sexual behavior is even more troublesome than the exposure to offensive language that was at issue in *Pacifica Foundation*.

Indeed, the parties do not dispute that the government has a well-established compelling interest in protecting children from unsupervised exposure to sexually explicit material.

We then turn to the solution which Congress crafted in § 505. Congress provided MSOs with two alternative methods of compliance with the section: (1) complete scrambling, or (2) time-channeling the programming into safe-harbor hours. Playboy and Graff argue that very few MSOs will be financially able to comply with § 505 by distributing expensive equipment that will fully scramble the signals of sex-dedicated networks as required by subsection (a). Plaintiffs fear that MSOs will drop adult programming entirely, rather than invest in technologies which will be made obsolete by the v-chip or that MSOs will transmit plaintiffs' networks for an unprofitably short eight-hour period. Not only do the plaintiffs foresee lost profits, they present the possibility of bankruptcy caused by implementation of § 505.

There is undoubtedly a substantial expense involved in complying with subsection (a). However, while an economic burden may warrant consideration when weighing the relative harms imposed by a law, economics alone cannot dictate the result where constitutional rights are at issue. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78, 96 S. Ct. 2440, 2456, 49 L.Ed.2d 310 (1976) (Powell concurring); *Mitchell v. Comm'n on Adult Entertainment Establishments*, 10 F.3d 123, 144 (3d Cir. 1993).²⁷ Moreover, § 505 does not

²⁷ While we are aware that *Young* and *Mitchell* are zoning cases, we consider that their holdings on economic impact are

require that MSOs shoulder potentially fatal economic burdens. If the economic hardship imposed by subsection (a) is too severe, an MSO is free to choose to comply with § 505 by time-channeling in accordance with subsection (b).

By including the time-channeling compliance option in § 505, Congress provided MSOs with decision-making flexibility and an economically less restrictive alternative. We thus find that the economic burden placed on MSOs by subsection (a) is not determinative of the result in light of the substantially less expensive option provided by time-channeling in subsection (b). It follows therefore that if the time-channeling alternative provides a constitutional means of compliance with § 505, then § 505 is constitutional.

Time-channeling was explicitly approved by the Supreme Court as a constitutional restriction on pervasive indecent speech in *Pacifica Foundation*. There, the Supreme Court found that one of the most troubling aspects of the Carlin broadcast was the early afternoon hour at which it was aired. Shown at that time, the broadcast was "like a pig in a parlor instead of the barnyard." *Pacifica Foundation*, 438 U.S. at 750, 98 S. Ct. at 3041 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114, 118, 71 L.Ed. 303 (1926)). The F.C.C. opinion challenged by the *Pacifica Foundation* did not intend to ban future indecent broadcasts entirely but merely sought to channel them into a safe-harbor period during which significant numbers of children would not be listening. *Id.* 438 U.S. at

relevant in that, as is the statute at issue in this case, the regulations there were directed at competing concerns of public welfare rather than at the speech itself.

732, 98 S. Ct. at 3031-32 (citing 59 F.C.C.2d 892 (1976)). The Supreme Court held that time-channeling was an appropriate response to the problem presented. It therefore approved the F.C.C. attempt to prevent the airing of offensive programming on a pervasive form of communication at a time of day when children were likely to be listening.

Because the Supreme Court endorsed a time-channeling solution in very similar circumstances in *Pacifica Foundation*, we believe that time-channeling also survives constitutional scrutiny here. It is important to our reasoning that § 505 does not seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing erotic material on premium cable networks if they so desire. It is clearly established that a complete ban on indecent speech will rarely (if ever) be tolerated. See *Denver Consortium*, — U.S. at —, 116 S. Ct. at 2387 (plurality opinion) (suggesting that § 10(a) passed constitutional muster in part because it gave a cable operator the flexibility to choose not to ban indecent broadcasts, but rather “to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children); *id.* at —, 116 S. Ct. at 2423 (Thomas, J., concurring in part and dissenting in part) (“Certainly, under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming.”); *Sable Communications*, 492 U.S. at 127, 109 S. Ct. at 2837 (holding total ban on indecent telephone communications to be unconstitutional and distinguishing the time-channeling remedy approved in *Pacifica Foundation* on grounds that it “did not involve a total ban on broadcasting indecent material.”); *Young*, 427 U.S. at 70, 96 S. Ct. at 2452 (finding that the First Amendment

protects communication in the area of sexually oriented materials from total suppression). The time-channeling alternative in § 505 explicitly allows MSOs to continue transmitting sex-dedicated networks. Section 505 thus leaves the speaker and the listener with an opportunity to maintain sufficient adult communication, while respecting the privacy interests of those who might be offended or inappropriately exposed. We believe the law thus strikes a permissible balance of constitutional interests.

The plaintiffs contend, nevertheless, that § 504 is a less restrictive option which is available to provide protection from signal bleed. They urge, therefore, that we declare § 505 invalid. However, the cost to MSOs of creating an adequate shield from a widespread intrusion of signal bleed by supplying converter/ lockboxes to households that don't subscribe to adult channels, would be close to the expense of providing converter/ lockboxes to non-subscribing households under § 505(a). The main difference is that under § 504 the household has to request the box, while under § 505 the MSO must provide the box.²⁸ We have no evidence in the present

²⁸ Plaintiffs also assert that Congress found, in § 551(a)(8) & (9) of the Act, that there is a compelling governmental interest in empowering parents to control the television viewing by their children, such as by providing parents with technological tools that allow them to easily block violent, sexual or other programming that they believe harmful to their children. Section 504 was one such mechanism, and the development of v-chip technology will be another. Congress recognized, as Senator Feinstein's remarks indicated, *supra*, that many parents are unaware of the problem of sexually explicit signal bleed and its accessibility to children of non-subscribers of sexually-dedicated channels. The parental control option is viewed as an adjunct of lesser efficacy because its

record that local cable operators or producers of sexually explicit programming are advertising the free availability of the § 504 lockbox or other blocking devices upon demand. Likewise, there is no evidence that parents are otherwise aware of the § 504 means of achieving complete blocking of undesired channels. Upon this record, the government has demonstrated an expectation that § 504 will not be a viable alternative.

Moreover, in view of the fact that children watch television in the homes of their friends as well as in their own homes, we do not find Congress to have been unreasonable in wishing to extend protection from signal bleed beyond a child's own home.

Furthermore, Congress enacted, as one of the regulatory options, time channeling, which the Supreme Court had in *Pacifica Foundation* held to be a constitutionally acceptable way of protecting children from a pervasive, sexually explicit medium. Therefore, even if § 505(a) does not pass constitutional analysis, § 505(b) does.

Given the content of adult programming and the pervasive nature of cable television, we find that § 505 is an acceptable governmental response intended to prevent exposure of minors to sexually explicit signal bleed. We therefore conclude that plaintiffs have failed to show that they are likely to succeed in their claim that the provision violates their First Amendment rights to freedom of speech.²⁹

exercise requires knowledge and the taking of affirmative steps such as requesting the blocking device from the MSO.

²⁹ We are mindful that the Supreme Court in *Denver Consortium* referred to the Telecommunications Act of 1996, including

C. Fourteenth Amendment Equal Protection Jurisprudence

Likewise, plaintiffs have not persuaded us that they can succeed on the merits of their claim that § 505 violates their rights guaranteed by the Equal Protection Clause. Playboy and Graff argue that other premium channel networks carry adult-oriented programming but that § 505 will not restrict the speech of these networks. They claim, for example, that HBO and Showtime present programming that is an equivalent to the sexually oriented programming shown on the Playboy networks and on Spice, and that this programming is shown at hours outside of the safe-harbor period. They assert that legislation directed at them, but not at these other premium networks, denies them equal protection of the laws. See, e.g., *News America Pub., Inc. v. F.C.C.*, 844 F.2d 800, 813 (D.C. Cir. 1988) ("The safeguards of a pluralistic political system are often absent when the legislature zeroes in on a small class of citizens.") (citing *Railway Express Agency v. New York*, 336 U.S. 106, 69 S. Ct. 463, 93 L.Ed. 533 (1949)).

There is, however, a significant difference between plaintiffs' networks and the non-adult premium networks. The plaintiffs admit that *all* of the programming shown on their networks—in some cases, twenty-four hours per day—is "adult programming." Transcript of Preliminary Injunction Hearing 201-02 (D. Del. May 20, 1996) (testimony of Steven Saril,

specifically § 505, as "significantly less restrictive" than § 10(b) of the 1992 Cable Act which they struck down. See, e.g., — U.S. at —, 116 S. Ct. at 2392. However, since § 505 was not before the Court in *Denver Consortium*, this reference is dictum.

Senior Vice President of Sales and Marketing for Graff); see Deposition of Anthony J. Lynn, President of Playboy Entertainment Group, Inc. at 124-25 (Def.'s Ex. 72) (stating that sexually explicit programming aired on AdulTVision "is at risk of being defined as sexually explicit" under § 505); Plaintiff Graff Pay-Per-View Inc.'s Answers to Defendants' First Set of Interrogs. at 6 (Def.'s Ex. 43) (responding that 100% of Graff's programming contains material that is "sexually oriented"). On the premium channels, however, sexually explicit shows constitute only a fraction of the programming. For example, only one sixteenth of the programming on the non-adult cable channels on a Friday evening in Denver was sexually explicit. Moreover, many of the shows constituting that one-sixteenth were "R" rated movies with some sexually explicit scenes, rather than being 100% sexually explicit. Thus, it cannot be said that the non-adult channels, such as HBO and Showtime, are "primarily dedicated" to sexually explicit programming. Moreover, signal bleed from that one-sixteenth, if signal bleed occurred, would not continuously present sexually explicit scenes to the channel surfer.³⁰

We find therefore that Congress was justified in initially addressing the problem of sexually explicit signal bleed by focusing on sex-dedicated networks. Section 505's "differential treatment" of plaintiffs' networks is justified by their "special characteristic" of providing nothing but sexually explicit programming

³⁰ We note also that § 505 applies uniformly and without discrimination to all networks that are "primarily dedicated to sexually-oriented programming." Pub.L. No. 104-104, § 505, 106 Stat. at *136 (1996) (emphasis added). The law does not, for instance, favor Playboy over Graff.

intended for adult audiences. See *Turner Broadcasting*, 512 U.S. at —, 114 S. Ct. at 2468. It is perfectly logical that Congress would begin its attempt to prevent minors from gaining access to programming intended solely for adults by focusing first on the networks that specialize in adult-only programming. "Congress need not deal with every problem at once," and Congress "must have a degree of leeway in tailoring means to ends." *Denver Consortium*, — U.S. at —, 116 S. Ct. at 2393 (majority opinion) (citing *cf. Semler v. Oregon Bd. Of Dental Examiners*, 294 U.S. 608, 610, 55 S. Ct. 570, 571, 79 L.Ed. 1086 (1935) and *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03, 93 S. Ct. 2080, 2086-87, 36 L.Ed.2d 772 (1973)); see also *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L.Ed. 563 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434, 113 S. Ct. 2696, 2707, 125 L.Ed.2d 345 (1993) (The Court does not "require that the Government make progress on every front before it can make progress on any front.").

We find that the means chosen by Congress to protect children and aid their parents was a permitted and measured response to a national problem. The cause of the problem was primarily traced to sex-dedicated networks and, understandably, Congress began its efforts to address the problem by focusing on those networks.³¹ Congress thus made a logical

³¹ Furthermore, this is not a case involving governmental discrimination against a suspect class, nor is there any evidence of arbitrary or invidious governmental conduct. See, e.g., *New York City Transit Authority v. Beazer*, 440 U.S. 568, 592-93, 99 S. Ct.

distinction and tailored the law in an acceptable manner. As a result, plaintiffs' claim that § 505 will violate their right to equal protection of the laws is likely to fail.

D. Vagueness Jurisprudence

After the Supreme Court's decision in *Denver Consortium*, it is clear that plaintiffs' vagueness claim will also fail on the merits. Graff noted in its Memorandum of Law in support of its Motion for a Preliminary Injunction that "the Supreme Court has before it a similar vagueness challenge in the cable indecency case," citing *Denver Consortium*. At that time, argument had been heard by the Supreme Court in *Denver Consortium*, but the decision was pending. When the Supreme Court published its decision in that case, it flatly rejected the plaintiffs' argument that the provisions challenged were unconstitutionally vague. *Denver Consortium*, — U.S. at —, 116 S. Ct. at 2389-90. The Court concluded that similar terms had been previously defined by courts and by the F.C.C. It also found the language of the statute "similar to language previously used by this Court for roughly similar purposes," referring to its decision in *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 2614-15, 37 L.Ed.2d 419 (1973), among others. *Id.* — U.S. at —,

1355, 1369-70, 59 L.Ed.2d 587 (1979). Therefore, we apply rational basis review and ask whether the alleged classification is "rationally related" to a "legitimate" government interest. In our discussion of First Amendment jurisprudence, *supra*, we applied a much higher standard of scrutiny and concluded that § 505 is constitutional. We therefore hold that § 505 is not merely rationally related to a legitimate government interest, it is carefully tailored to an interest that is widely regarded as compelling.

116 S. Ct. at 2389. Thus, the use of accepted terms imbued the statute with meaning.

In recent decisions, other members of the federal judiciary have likewise found that the term "indecent" has, over time, been sufficiently defined. See *American Civil Liberties Union v. Reno*, 929 F. Supp. at 865, 868 (Dalzell, J., concurring); *Shea ex rel. American Reporter v. Reno*, 930 F. Supp. 916, 935-36 (S.D.N.Y., 1996). As pointed out recently by a three-judge panel in the United States District Court for the Southern District of New York, federal courts have approved the F.C.C.'s definition of "indecent" and have rejected vagueness challenges to that term in the context of broadcast media, commercial telephone communications, and cable programming. See *Shea*, 930 F. Supp. at 935-36. The court in *Shea* comprehensively reviewed the precedent in this area, and we find their research and their reasoning persuasive.

Therefore, we conclude that § 505 does not suffer from the "vice of vagueness." The plaintiffs clearly understood that the law applied to them, and in the wake of this litigation, it is clear that the F.C.C. would apply § 505 to MSOs that carry the plaintiffs' networks. Thus, the meaning and application of § 505 should be plain to MSOs as well. Playboy and Graff have little-to-no chance of succeeding on the merits of a vagueness claim.

VI. Conclusion

Plaintiffs have not satisfied the elements of the preliminary injunction test. We will therefore remove the temporary restraining order, which was previously

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granted by this court, and we will deny plaintiffs request for preliminary injunctive relief.

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APPENDIX C

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

Civil Action No. 96-94-JJF

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Dec. 29, 1998

ORDER

This 29th day of December, 1998, the Court having reviewed the submissions of the parties in support of and in opposition to plaintiff Playboy Entertainment Group, Inc.'s action, challenging the constitutionality of Section 505 of the Telecommunications Act of 1996,

IT IS ORDERED that, for the reasons stated in the Opinion of this Court, issued on December 28, 1998, defendants, United States of America; United States Department of Justice; Janet Reno, Attorney General; and the Federal Communications Commission, are

permanently enjoined from enforcing Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

/s/ JANE R. ROTH
JANE R. ROTH
United States Circuit
Judge

/s/ JOSEPH J. FARNAN, JR.
JOSEPH J. FARNAN, JR.
United States District
Judge

/s/ JEROME B. SIMANDLE
JEROME B. SIMANDLE
United States District
Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94 (JJF)

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, *ET AL.*, DEFENDANTS

Jan. 14, 1999
[Docketed Jan. 19, 1999]

NOTICE OF APPEAL

Please take notice that pursuant to section 561 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 142, codified at 47 U.S.C. § 223 note, and 28 U.S.C. § 1253, all defendants in this action, and specifically the United States of America; the United States Department of Justice; Janet Reno, Attorney General; and the Federal Communications Commission, hereby appeal to the United States Supreme Court from the Order entered on the docket on December 30, 1998, which was based upon the opinion issued on December 28, 1998.

Dated: January 19, 1999

Respectfully submitted,

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Assistant Attorney General

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94 (JJF)

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS

Mar. 18, 1999

ORDER

Upon consideration of Defendants' Motion to Alter or Amend Judgment and Defendants' Motion to Correct Judgment, its supporting brief, Plaintiff Playboy Entertainment Group, Inc.'s brief opposing these motions, and Defendants' Reply Brief; and

The court finding that this court lacks jurisdiction to adjudicate these motions due to subsequent filing of Defendants' notice of appeal to the United States Supreme Court;

IT IS this 18 day of March, 1999 hereby

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ORDERED that Defendants' Motion to Alter or Amend Judgment and Defendants' Motion to Correct Judgment shall be, and they hereby are, DISMISSED.

/s/ JANE R. ROTH
JANE R. ROTH
United States Circuit
Judge

/s/ JOSEPH J. FARNAN, JR.
JOSEPH J. FARNAN, JR.
U.S. Chief District Judge

/s/ JEROME B. SIMANDLE
JEROME B. SIMANDLE
U.S. District Judge

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APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

No. Civil Action 96-94 (JJF)

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed: Apr. 7, 1999]

NOTICE OF APPEAL

Please take notice that pursuant to section 561 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 142, codified at 47 U.S.C. § 223 note, and 28 U.S.C. § 1253, all defendants in this action, and specifically the United States of America; the United States Department of Justice; Janet Reno, Attorney General; and the Federal Communications Commission, hereby appeal to the United States Supreme Court from the Order dated March 18, 1999, filed on March 18, 1999, and entered on the docket on March 19, 1999; and from the Order

entered on the docket on December 30, 1998, which was based upon the opinion issued on December 28, 1998.

Respectfully submitted,
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APPENDIX G

1. Section 504 of the Telecommunications Act of 1996, codified at 47 U.S.C. 560 (Supp. II 1996), provides:

§ 560. Scrambling of cable channels for nonsubscribers

(a) Subscriber request

Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

(b) "Scramble" defined

As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

2. Section 505 of the Telecommunications Act of 1996, codified at 47 U.S.C. 561 (Supp. II 1996), provides:

§ 561. Scrambling of sexually explicit adult video service programming

(a) Requirement

In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) Implementation

Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) "Scramble" defined

As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

3. Rule 59 of the Federal Rule of Civil Procedure provides:

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) **Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Time for Serving Affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) **Motion to Alter or Amend Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

4. Rule 60 of the Federal Rule of Civil Procedure provides:

Rule 60. Relief From Judgment or Order

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the

appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief

from a judgment shall be by motion as prescribed in these rules or by an independent action.

5. Rule 4(a)(4) of the Federal Rule of Appellate Procedure in relevant part provides:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

(4)(A) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

- (i) for judgment under Rule 50(b);
- (ii) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;
- (iii) to alter or amend the judgment under Rule 59;
- (iv) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;
- (v) for a new trial under Rule 59; or
- (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a

previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

6. Section 561 of title V of Pub. L. 104-104, codified at 47 U.S.C. 223 note, provides:

(a) **THREE-JUDGE DISTRICT COURT HEARING.**—Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title [see Short Title of 1996 Amendment note set out under section 609 of this title] or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

(b) **APPELLATE REVIEW.**—Notwithstanding any other provisions of law, an interlocutory of final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

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Supreme Court, U.S.

FILED

MAY 19 1999

CLERK

No. 98-1682

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNITED STATES OF AMERICA, et al.,
Appellants,

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellee.

On Appeal from the United States District Court
for the District of Delaware

MOTION TO AFFIRM

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**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Appellee Playboy Entertainment Group, Inc. was the plaintiff in the court below. The United States of America, the United States Department of Justice, Attorney General Janet Reno, and the Federal Communications Commission were the defendants. Spice Entertainment Companies, Inc. ("Spice") (formerly Graff Pay-Per-View, Inc.) was a party below in a consolidated action at the preliminary injunction stage, but did not participate in the litigation on the merits. Playboy Enterprises, Inc., through a wholly-owned subsidiary, acquired Spice in March 1999.

Pursuant to Supreme Court Rule 29.6, Appellee notes that Playboy Entertainment Group, Inc. ("PEGI") is a non-publicly traded corporation organized under the laws of Delaware and is a wholly-owned subsidiary of Playboy Enterprises International, Inc. ("PEII"), a non-publicly traded corporation organized under the laws of Delaware. Both PEII and Spice are wholly-owned subsidiaries of PEI Holdings, Inc. ("PEI Holdings"), a non-publicly traded corporation organized under the laws of Delaware. PEI Holdings is a wholly-owned subsidiary of Playboy Enterprises, Inc., a publicly traded corporation organized under the laws of Delaware.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 98-1682

UNITED STATES OF AMERICA, et al.,
Appellants,

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellee.

On Appeal from the United States District Court
for the District of Delaware

MOTION TO AFFIRM

Appellee Playboy Entertainment Group, Inc. ("Playboy") respectfully requests that this Court affirm the decision of the three-judge district court that Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the Act"), violates the First Amendment to the United States Constitution.¹ Appellee further asks that this Court affirm the

¹To supplement the Opinions and Orders below provided as Appellants' Appendix (J.S. App. 1a-101a), the district court's opinion granting Appellee's request for a temporary restraining order (reported at 918 F. Supp. 813) is reprinted *infra* at App. 1a-17a. The district court's opinion denying the parties' cross-motions for summary judgment on the issue of vagueness (unreported) is at

district court's dismissal of Appellants' post-trial motions to modify the judgment.

The district court correctly held that Section 505 violates the First Amendment because it is more restrictive than necessary and because the government failed to prove that its stated interests were real and not conjectural. Specifically, the district court found that:

- Section 505 imposes a content-based restriction on constitutionally-protected speech that effectively imposes a ban on adult cable networks for two-thirds of the broadcast day in the vast majority of cable systems. J.S. App. 33a.
- Although the purpose of Section 505 is solely to protect children, it significantly restricts speech in all U.S. households, including the two-thirds of all homes that do not have children under 18. J.S. App. 34a.
- The "problem" of signal bleed was never established in the legislative history, which the court below described as "an absolute void." App. 15a. Nor was the problem demonstrated after two years of litigation involving extensive expert testimony. In sum, the government compiled anecdotal evidence comprising "only a handful of isolated incidents" in which signal bleed was a problem in "the 16 years since 1982 when Playboy started broadcasting." J.S. App. 11a-12a.
- Less restrictive means were found to exist to deal with any problems attributable to signal bleed. Cable television set-top converters, as well as modern television sets and VCRs have child lock-out features. In addition, Section 504 of the Act enables any customer to obtain on request free of charge a blocking device for any network. The court found that Section 504 is a less restrictive alternative because it addresses the phenomenon of signal bleed in a content-

App. 20a-25a, *infra*. The Federal Communications Commission's denial of Appellee's request for a declaratory ruling is at App. 28a-29a, *infra*.

neutral manner that is tailored to the households that need it. J.S. App. 38a.

The district court correctly applied strict First Amendment scrutiny below, but its decision would be the same even if it had applied intermediate constitutional review. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) ("*Denver*"). Section 505 imposes a wholesale ban on specified cable channels during "the hours when most viewers want to see such programming," J.S. 18 n.6, and thus is far more restrictive than either the "permissive" controls upheld in *Denver* or the per-program safe harbor upheld in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*"). The few anecdotal examples of signal bleed unearthed in the record below fall far short of what is required for the government to sustain its burden of showing that Section 505 "is necessary to protect children or that it is appropriately tailored to secure that end." *Denver*, 518 U.S. at 766. The record below also revealed that voluntary blocking, such as that provided by Section 504, was sufficient to rectify the problem in virtually all of the instances the government was able to find, J.S. App. 12a, placing the district court's decision squarely within the precedents relating to least restrictive means. *Denver*, 518 U.S. at 757-759. Consequently, the decision below should be summarily affirmed, because this case presents no substantial federal question requiring appellate review by this Court.

STATEMENT

1. Cable television operators provide their subscribers with various packages of programming channels for a monthly fee. J.S. App. 5a. They typically provide a "basic" service that includes local broadcast networks, leased and public access channels, and news, education, music, sports and shopping channels. Unlike broadcasting channels that offer programming on a wide variety of subjects, a cable programming channel often is oriented toward a particular subject area. Operators also offer "premium" channels for an additional fee, the signals for which are scrambled to prevent unauthorized access. Such channels may include HBO, Cinemax, Showtime, and adult entertainment channels. *Id.* Premium programming may also be offered on a "pay-per-view" basis. The pay-per-view customer places an order with the cable

operator for a particular program or a specified period of time. When a consumer places a pay-per-view order, the operator unscrambles the signal for the viewing period and then rescrambles it by remote accessing a converter box in the subscriber's home. *Id.*

Since 1982, Playboy has provided cable operators with adult, sexually oriented programming on premium networks.² Playboy Television provides adult oriented programming that includes films, short form videos, live talk shows, and lifestyle programming such as book and movie reviews, news, and music videos. Playboy Television also offers special event programming such as Playboy's well-received four-hour program on AIDS awareness and safe sexual practices done in connection with the World AIDS Day created by the World Health Organization. AdultTVision and Spice offer almost exclusively full-length movies.

Like the providers of other premium networks, Playboy fully scrambles the video and audio portions of its programs when it transmits them to cable operators. The operators must descramble these transmissions before rescrambling the signal to restrict access to only those customers who have paid for the service. A phenomenon known as "signal bleed" may occur if discernible video and/or audio appears on cable customers' televisions although they have not purchased the premium channel or event. The court below described the nature and causes of signal bleed, and found that the "severity of the problem varies from time to time and place to place, depending on the weather, the quality of the equipment, its installation, and maintenance." J.S. App. 9a, 51a.

A variety of techniques are available to consumers to ensure they do not receive signal bleed. Cable signal converters and

²When this litigation began, Appellee provided programming on two networks, Playboy Television and AdultTVision, which was launched in 1994. Playboy recently acquired Spice Entertainment Companies, Inc. ("Spice") (formerly Graff Pay-Per-View, Inc.), which was a party below in a consolidated action through the preliminary injunction stage.

wiring configurations may prevent bleed, and many, if not most, modern TVs and VCRs enable viewers to program the devices to block reception of either an undesired channel or types of programming considered to be offensive.³ In addition, since 1984, federal law has required cable operators to offer their subscribers the ability to purchase or rent "lockboxes" to block out a particular channel or channels. 47 U.S.C. § 544(d)(2).

2. As part of the Telecommunications Act of 1996, Congress adopted a number of measures designed to enable parents to protect children from "indecent" or other television programming considered to be objectionable. Section 504 of the Act requires cable operators, without an additional charge, to "fully scramble" or otherwise "fully block the audio and video programming" of any channel upon the request of a customer who does not subscribe to the channel. 47 U.S.C. § 560. Similarly, Section 551, the so-called V-chip provision, requires that new televisions include circuitry to enable parents to block video programs that contain "sexual, violent, or other indecent material about which parents should be informed before it is displayed to children."⁴ 47 U.S.C. § 303 note.

Congress also enacted Section 505, the subject of this litigation, which requires that for any channel of service "primarily

³J.S. App. 9a-10a. Record evidence demonstrates that cable television set-top boxes ("converters") with "channel mapping" features do not permit signal bleed. J.S. App. 51a. Further, addressable converters typically have built in parental lock-out devices. Such converters are routinely used by multiple system operators ("MSOs"). In addition, many televisions and VCRs already have built-in child-lock circuitry that allows parents or others to lock out the audio and video of any channel, thereby preventing signal bleed. In a recent survey, eighty percent of more than 100 models of televisions currently being sold by a major electronics store contained built-in child-lock circuitry, which has been available for at least the past several years. During this period, more than 70 million new televisions were sold in the United States. Pl.'s Trial Ex. 62(b) (TV and Digital TV Household Universe, 1979-2007).

⁴Although the V-chip provisions of the Act do not address the issue of signal bleed, Section 551 and the extensive deliberations surrounding it demonstrate the belief of Congress that voluntary measures that empower parents to control program choices will protect children.

dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." 47 U.S.C. § 561. Any multichannel video programming distributor (referred to generally herein as a "cable operator") that could not meet the "block or scramble" requirements of Section 505(a) within 30 days after the Act was passed was required to cease all programming on the designated channels "during the hours of the day when a significant number of children are likely to view it." The Federal Communications Commission subsequently decided that these blackout hours run from 6 a.m. to 10 p.m. -- two thirds of the broadcast day. *Implementation of Section 505 of the Telecomms. Act of 1996*, 11 FCC Rcd. 5386 (1996) ("Implementation of Section 505").

Unlike Sections 504 and 551, Congress adopted Section 505 of the Act without hearings or debate. It was proposed as an amendment to the Senate telecommunications bill (S. 652) on June 12, 1995, and was voted upon and passed that same evening. 141 Cong. Rec. S8166-69 (daily ed. June 12, 1995). Section 505 was introduced as a floor amendment by Senators Lott and Feinstein, both of whom made brief remarks about it. See *id.* Other than these remarks, Congress gathered no information and made no legislative findings concerning Section 505.

3. Playboy brought suit in the United States District Court for the District of Delaware seeking injunctive relief and a declaration that Section 505 is unconstitutional.⁵ Before Section 505 took effect, Playboy sought and received a temporary restraining order enjoining its implementation and enforcement. App. 18a-19a, *infra*. Pursuant to Section 561 of the Act and 28 U.S.C. § 2284, a three-judge district court was convened to hear the case. After a hearing on the motion for a preliminary injunction, the district court denied Playboy's motion for a preliminary injunction. J.S. App. 40a-86a.

⁵Subsequently, Spice filed suit seeking similar relief on nearly identical grounds. *Graff Pay-Per-View v. United States*, Civ. Act. No. 96-107. The two cases were consolidated.

Although the district court denied Plaintiffs' request for a preliminary injunction, it identified a number of factual issues that it said would put it in "a better position" to consider whether the standard for a permanent injunction had been met. J.S. App. 53a & n.16. The court noted that it is not clear how many homes with the "potential" to receive signal bleed in fact receive it. The court asked for "more specific evidence" in subsequent proceedings on the actual extent of signal bleed as well as any evidence of its ill-effects on children, information on the degree to which adult networks would be adversely affected by Section 505 and evidence on the effectiveness of voluntary blocking pursuant to Section 504. *Id.* at 61a, 72a n.25, 79a-80a.

4. After this Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997) but before the hearing on the permanent injunction below, Playboy filed a motion for summary judgment on the question of vagueness. The FCC had interpreted Section 505 as not requiring the scrambling or time channeling of programming that is "not indecent" even if provided on a channel primarily dedicated to sexually-oriented programming, but provided no definitional guidance for applying this interpretation. *Implementation of Section 505*, 11 FCC Rcd. at 5387. Playboy argued that the vagueness of the indecency standard, coupled with a total absence of relevant FCC precedent, prevented it from providing alternative programming during non-safe harbor hours, thus making Section 505 more uncertain and overbroad. Appellants filed a cross-motion for summary judgment on the same issue.

On October 31, 1997, the district court denied both parties' motions. Although it found that *Reno* was not dispositive of the question before it, the court noted that "there remains a fundamental uncertainty surrounding the question of how a channel primarily dedicated to sexually-oriented programming during safe harbor hours would be classified if it opted to air an alternative type of programming during non-safe harbor hours." App. 25a. It further pointed out that the government was "unable to advise us whether there are any FCC letter or advisory opinions that are available to assist this Court, the plaintiff, or other channels 'primarily dedicated to sexually-oriented programming' in construing the scope of permissible regulation under Section

505," and deferred a decision "until further information relating to the enforcement of this provision by the Federal Communications Commission (FCC) is before us." *Id.* at 25a & n.6.

In connection with the district court's request for further evidence, Appellee filed a request for an expedited declaratory ruling with the FCC on November 19, 1997. The request asked for clarification of the indecency standard as it relates to Section 505, and asked for an advisory opinion with respect to nine programs that, with one exception, Playboy Television had either aired, or planned to transmit, on its network.⁶ The FCC denied the request, and in a one-page letter, wrote that "declaratory rulings related to programming issues must be dealt with cautiously" and "have the potential to be viewed as prior restraints." *Letter from Meredith Jones, Chief, FCC Cable Services Bureau, to Robert Corn-Revere*, Jan. 30, 1998, *infra* App. 28a-29a. The FCC provided no further interpretive guidance, except that during the trial on the permanent injunction, the government argued that all of the programs submitted to the FCC, including safe sex documentaries, would be considered indecent if transmitted on Playboy Television.⁷

5. Following several days of hearings in March 1998, the district court in December held that Section 505 is unconstitutional. J.S. App. 1a-39a. The court decided that "either strict scrutiny or something very close to strict scrutiny" applies because Section 505 is a content-based restriction on speech.

⁶The request included two safe sex documentaries produced for World AIDS Day (*Doin' it Right* and *Hot, Sexy and Safer*), two critically acclaimed theatrical films (*9-1/2 Weeks* and *The Unbearable Lightness of Being*), two magazine-style Playboy news programs (*360 - Sex in the USA* and *Playboy Late Night*), a recurring program that describes a current issue of *Playboy* magazine and events related to Playboy (*World of Playboy*), a recurring feature on Playboy centerfold models (*Video Playmate Calendar*) and an action-adventure film (*Rambo: First Blood, Part II*). A videotape of each of the nine programs was provided to the FCC.

⁷Defs.' Post-Trial Br. at 67-69. One of the programs condemned by the government has been found to be acceptable for showing in a mandatory middle school assembly. See *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996).

Although the provision ostensibly has a content-neutral objective of preventing signal bleed, the court noted that Section 505 is triggered only in response to specific types of adult programming. J.S. App. 25a ("Signal bleed from the Disney Channel, for example, does not come within the purview of the statute."). Ultimately, the court found that Section 505 is more restrictive than necessary to serve the government's stated interests.⁸

Although the court had been skeptical at the preliminary injunction stage of the potential losses that would be caused by Section 505, it found that the "restrictiveness of § 505 is now evident" given the experience following the law's implementation. J.S. App. 33a. The court found that cable operators with insufficient scrambling technology "unanimously chose[] to stop all such programming on dedicated adult channels during the non-safe harbor hours" and that the "vast majority" of cable systems adopted time channeling to comply with Section 505. *Id.* at 33a n.23. It noted that neither Playboy nor the government could identify a single cable system that had adopted any approach other than time channeling, and concluded that cable operators had "no practical choice but to curtail such programming" for two-thirds of the broadcast day in all households, whether or not children were present. *Id.* at 16a-17a. Despite the parties' disagreement about the financial impact on Playboy, the court found that the actual amount of financial loss, while significant, "is of little relevance to [the] First Amendment analysis." *Id.* at 18a. It concluded that the time channeling requirement of Section 505 "diminishes Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech." *Id.* at 33a-34a.

At the same time, the court's reservations about the pervasiveness of signal bleed as a problem were not assuaged. While the district court agreed that Section 505 was intended to

⁸Because it resolved the case on the question of Section 505's relative restrictiveness, the court did not reach the merits of Playboy's contentions that Sections 505 is unconstitutionally vague and that it violates the Equal Protection Clause. J.S. App. 23a, 39a. If there are further proceedings in this case, however, these issues provide independent reasons why Section 505 is unconstitutional.

address a compelling interest, it pointed out that the "mere articulation of a theoretical harm is not enough." J.S. App. 28a. It further noted that the government presented "no evidence on the number of households actually exposed to signal bleed," and instead offered anecdotal evidence comprising "only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting." *Id.* at 11a-12a. It found that the lack of evidence provided by the government at trial "is reflected by the same dearth of evidence of harm within the legislative history of § 505." *Id.* at 29a.

Comparing Sections 504 and 505 as alternative ways to deal with signal bleed, the court concluded that "§ 504 is not restrictive of anyone's First Amendment rights and is clearly 'less restrictive'" than Section 505. J.S. App. 34a. Significantly, the court found that "two-thirds of all households in the United States have no children" but that Section 505 applies "irrespective of whether a household has children." *Id.* at 33a-34a. It also found that the content-neutrality of Section 504 made it less restrictive of First Amendment interests than Section 505. Although the Justice Department had submitted evidence that very few subscribers had availed themselves of Section 504, the court noted that "the finding of minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." *Id.* at 36a. "Indeed," the court concluded, "the Government has not convinced us that it is a pervasive problem." *Id.*

The court found that cable operators communicate the availability of channel blocking through a variety of means, including monthly billing inserts, special mailings, barker channels and adult channel advertisements. J.S. App. 20a. But it said that it "is not clear" that such notices of the provisions of § 504 have been adequate. *Id.* at 36a. Accordingly, the court directed Appellee to ensure that cable operators provide their customers with "adequate notice" of Section 504. *Id.* at 38a.

The district court permanently enjoined the government from enforcing Section 505 by its Order dated December 29, 1999.

6. On January 12, 1999, the government filed motions pursuant to Rule 59(e) of the Federal Rules of Civil Procedure seeking to alter or amend the judgment to limit the injunction to Playboy, and Rule 60(a) seeking to correct the judgment by including the "adequate notice" requirement within the mandate. Appellants filed a Notice of Appeal from the district court's decision and injunction order one week later, on January 19, 1999, while the motions to alter and correct the judgment were still pending. The district court dismissed the Rule 59(e) and 60(a) motions on March 18, 1999, holding that it lacked jurisdiction to consider them. J.S. App. 91a-92a. Appellants filed a further Notice of Appeal on April 7, 1999, seeking review of both the December 1998 and March 1999 Orders of the district court.

ARGUMENT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION REGARDING THE UNCONSTITUTIONALITY OF SECTION 505

A. The District Court Correctly Applied Strict First Amendment Scrutiny to Section 505

The district court quite correctly applied strict First Amendment scrutiny in this case to find that Section 505 is unconstitutional. J.S. App. 23a-26a; 67a. Appellants' claim that the court should have scrutinized the law less rigorously on the theory that indecency on cable television is "constitutionally indistinguishable" from indecency on broadcast media (J.S. 17) is premised on a plain misunderstanding of controlling authority. While the *Denver* plurality compared broadcasting and cable television and found that both media are "pervasive," 518 U.S. at 744-745, it expressly declined the government's invitation to apply the *Pacifica* holding to cable television. *Id.* at 755 (plurality op.); 803-804 (Kennedy, J., concurring in part, dissenting in part).

The *Denver* plurality eschewed adoption of "a rigid single standard, good for now and for all future media and purposes," 518 U.S. at 742 (plurality op.), but the result in that case, as well as the reasoning of the various opinions, suggests that this Court applied a standard that is comparable to strict scrutiny.

Significantly, a majority of Justices expressly endorsed the use of strict scrutiny to review content-based speech restrictions imposed on cable television.⁹ And while the plurality may not have applied strict scrutiny by name, *Denver*'s speech-protective result was reached by "closely scrutinizing" the law "with the greatest care." 518 U.S. at 747 (plurality op.) ("Our basic disagreement with Justice Kennedy is narrow."); *id.* at 743 (Court must "closely scrutiniz[e]" the provisions of Section 10 to ensure that it does not impose "an unnecessarily great restriction on speech"). Accordingly, the district court correctly concluded that this Court prescribed the use of "strict scrutiny or something very close to strict scrutiny." J.S. App. 23a; 64a-68a.

Appellants, however, complain that the district court here gave no weight to the concerns requiring special treatment of broadcasting, J.S. 15, and assert that "[h]ad the district court taken *Pacifica* and its rationale into account, it would have upheld Section 505." *Id.* at 17. This is plainly wrong. First, Appellants' facile claim that the government's interest is stronger here than in the broadcasting context because *Pacifica* involved the "one-time broadcast of inappropriate language" compared to "channels that carry 'virtually 100% sexually explicit adult programming,'" J.S. 17, is not correct, nor is it supported by the record below.¹⁰

⁹ Justices Kennedy and Ginsburg wrote that strict scrutiny is the applicable standard, and that all of Section 10 should be invalidated. *See Denver*, 518 U.S. at 803-804 (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part). Justices Thomas, Scalia and Chief Justice Rehnquist similarly agreed that strict scrutiny should apply to content regulation of cable television, but concluded, for reasons that are unique to leased access channels, that the blocking and segregation requirements of Section 10(b) were the least restrictive means of serving the governmental interest. *See id.* at 834 (Thomas, J., concurring in judgment in part and dissenting in part) (discussing least restrictive means analysis in light of the "distinguishing characteristic[s] of leased access channels").

¹⁰ It is far from obvious from the record that a channel with 100% sexually explicit programming is any more harmful than any other premium channel. *Compare* App. 17a n.11 (describing the content of audio signal bleed from an adult channel as "akin to the utterances of actress Meg Ryan during her performance in the diner scene in the movie *When Harry Met Sally*"), with Pl.'s

Second, there is far less need here for the government to impose mandatory programming restrictions as opposed to voluntary blocking of a particular channel. Voluntary solutions are far more effective to block unwanted programming when transmitted on adult channels compared to broadcasting or even to other premium cable channels because the blocking device is fully effective upon its initial activation and does not require subsequent adjustments to keep up with changing programming schedules.¹¹

Most importantly, the very outcome in *Denver* reveals the fundamental flaw in the government's reasoning. There, if this Court had "taken *Pacifica* and its rationale into account" in the way Appellants now suggest, it could not have reached the result that it did. In practical terms, *Denver* approved cable operators' ability to transmit (or not) totally unscrambled indecent programming on leased or public access channels at any time of the day or night. 518 U.S. at 752 (plurality op.). The editorial discretion to permit such programming (that by federal law is banned from the broadcast airwaves until safe harbor hours) on cable access channels is explained by the fact that this Court's cases "since *Pacifica* have * * * turned as much on the context or medium of the speech as on its content." *Id.* at 775 n.2 (Souter, J., concurring). A critical contextual factor here is that "other means to protect children" are available with cable television technology, and as described below, the district court correctly found that such "other means" represent a less restrictive alternative to Section 505. Additionally, as described below, Section 505 is far more restrictive of speech than the regulations upheld in *Pacifica*.

Trial Ex. 18 at 2 (HBO film *Another 48 Hours* averages a profanity every 30 seconds).

¹¹ On cable channels where indecent programming is shown "randomly or intermittently between non-indecent programs," a lockbox is likely to be less effective than where it can be used to "simply block out certain channels." *Denver*, 518 U.S. at 833-834 (Thomas, J., concurring in the judgment in part and dissenting in part). Similarly, in the broadcasting context, this Court found that a warning announcement before a program "cannot completely protect the viewer or listener from unexpected program content" because "the broadcast audience is constantly tuning in and out." *Pacifica*, 438 U.S. at 748.

B. Section 505 is Unconstitutional Even Under Intermediate Scrutiny

Even if the district court had applied intermediate scrutiny to Section 505, it still would have found the law to be unconstitutional. Very simply, nothing in *Denver* or any other case supports the government's bald assertion that "[h]ad it not [applied strict scrutiny], the [district] court would have concluded that Section 505 is constitutional." J.S. 12. Quite to the contrary, the plurality in *Denver* found that the law at issue there "fails to satisfy this Court's formulations of the First Amendment's 'strictest,' as well as its somewhat less 'strict,' requirements." *Denver*, 518 U.S. at 755; *id.* at 803-804 (Kennedy, J., concurring in part and dissenting in part); *see also* J.S. App. 66a.

Precisely the same analysis applies here as in *Denver*. There, a majority voted to invalidate Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1486, § 10(b) ("1992 Cable Act") which required cable operators that chose to permit indecent programming on leased access channels to segregate such programming to a separate channel and to block access prior to receiving a written request.¹² This Court found that Section 10(b) was "more extensive than necessary" and that it failed to take into account "other means to protect children from similar 'patently offensive' material broadcast on *unleased* cable channels." 518 U.S. at 755-756 (plurality op.) (emphasis in original). The district court correctly held that both conclusions are equally warranted in this case.

¹²The Court in *Denver* also struck down Section 10(c) of the 1992 Cable Act, which restricted indecent programming on public access channels. The decision to invalidate Section 10(b), however, was the only part of the opinion of the Court to garner a majority. 518 U.S. at 753-760. Significantly, Section 10(b) was described by the government in this case as "remarkably similar to Section 505" and was the provision most often compared to Section 505 at the preliminary injunction stage of this litigation. *See* Defs.' Opp'n Br. to the Mot. for Prelim. Inj. at 2, 3, 4, 14, 21, 23, 24, 25, 26, 33, 34, 37, 40-42, 43, 54, 58, 63, 68, 71. (20 separate citations comparing Section 505 to Section 10(b)).

1. Section 505 is More Extensive Than Necessary to Serve the Government's Interest

There is no dispute that Section 505 prevents the transmission of Appellee's programming during "the hours when most viewers want to see such programming." J.S. 18 n.6. The district court found that Section 505 "restricts a significant amount of protected speech" because time channeling results in "the removal of all sexually explicit programming at issue during two-thirds of the broadcast day from all households on a cable system." J.S. App. 33a. The court found the restriction to be extensive since "30-50% of all adult programming is viewed by households prior to 10 p.m." and because Section 505 restricts access to such programming "irrespective of whether a household has children." *Id.* at 33a-34a. This factor makes the restrictions imposed by Section 505 particularly excessive since the district court found that "two-thirds of all households in the United States have no children." *Id.* at 34a.

It is no answer to suggest, as the government does here, that the speech restrictions imposed by Section 505 are constitutionally sound because the *Denver* plurality "relied heavily on *Pacifica* to uphold one of the cable television regulations at issue there." J.S. 14. The only regulation upheld in *Denver*, out of the three at issue, is not comparable to Section 505. The rule upheld in *Denver* -- Section 10(a) -- merely permitted cable operators to reject indecent programming on leased access channels. Unlike Section 505, Section 10(a) imposed no requirement at all on cable operators to restrict indecent programming,¹³ and the vast majority

¹³*Denver*, 518 U.S. at 750 (plurality op.) (Court approved only permissive controls on indecent leased access programming); *id.* at 768 (Stevens, J., concurring) ("The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition."); *id.* at 779 (O'Connor, J., concurring in part and dissenting in part) (Sections 10(a) and 10(c) leave to the cable operator the decision whether or not to broadcast indecent programming.); *id.* at 823 (Thomas, J., concurring in part and dissenting in part) ("The permissive nature of §§ 10(a) and (c) is important in this regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right . . . to compete for space on an operator's system.") (citation omitted).

of cable operators apparently adopted no such policy.¹⁴ In sharp contrast, the district court here found that the "vast majority" of cable systems adopted time channeling to comply with Section 505, that neither Playboy nor the government could identify a single cable system that had adopted double scrambling, and that cable operators had "no practical choice but to curtail such programming" for two-thirds of the broadcast day in all households, whether or not children were present. J.S. App. 16a-17a.

Even in those systems that chose to restrict indecent leased access programming pursuant to Section 10(a), the First Amendment question there is quite different from the one presented here. Section 10(a) expanded cable operators' editorial control over leased access channels because it empowered them for the first time to accept or reject indecent programs on those channels.¹⁵ Moreover, unlike the governmental mandate imposed by Section 505, there is no possibility that the voluntary rules approved in *Denver* would be vague or overly broad, since cable operators themselves were given the authority to define what programming is "indecent." Such leased access requirements can only be enforced pursuant to a "written and published policy" *Denver*, 518 U.S. at 752 (plurality op.) (published policy requirement "protects against over broad application of its standards"), and must be applied consistently to "substantially similar programming," *id.* at 752-753.

Section 505 restricts a great deal more speech than Section 10(a), and is far more censorial than the restrictions upheld in

¹⁴ See *Cable Television Consumer Protection & Competition Act of 1992*, 62 Fed. Reg. 28371, 28371 (May 23, 1997) (only about 100 cable systems expected to adopt a written policy limiting indecency); *Denver*, 518 U.S. at 745 (plurality op.) ("[t]he permissive nature of § 10(a) means that it likely restricts speech less than, not more than, the ban at issue in *Pacifica*").

¹⁵ *Denver*, 518 U.S. at 743 (plurality op.) (provision involves a complex balance of First Amendment interests); see also Brief for the Federal Respondents, 1996 WL 34132 at *25, *Denver* (Nos. 95-124 & 95-227), (the rules "limit programmers' expressive activity only insofar as -- and to precisely the same extent as -- they expand that of the operators").

Pacifica Whether or not some of *Pacifica*'s reasoning may apply to cable television as suggested by the *Denver* plurality, the time channeling requirement of Section 505 is far more restrictive of speech when applied to cable television networks than it is in the broadcasting context. With respect to broadcasters, the safe harbor rules may require a station to reschedule a particular program to late night hours.¹⁶ By comparison, Section 505 targets "channels" not "programs," and the court below found that the affected networks had "no practical choice" but to go dark for 16 hours per day. J.S. App. 17a; cf. *United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995) (blanket rule "chills potential speech before it happens" and imposes greater First Amendment burden than "an isolated disciplinary action"). This is a fundamental breach of the basic principle that "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone * * *."¹⁷ The problem is exacerbated by the government's failure to clarify the indecency standard under Section 505. Although the district court found it unnecessary to resolve the vagueness issue because it was able to decide the case on other grounds, the record below

¹⁶ *Pacifica* upheld only the government's ability to subject a particular broadcast to subsequent review. 438 U.S. at 735-738. It did not authorize the FCC "to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves." *Id.* The Court noted that the ruling applied only to the "specific factual context" presented by the FCC's order -- whether the Commission had the authority "to proscribe this particular broadcast," *id.* at 742 (internal quotation marks omitted), and expressly limited its holding to approve only the "subsequent review" of the particular words that had been broadcast, *id.* at 737; see also *Reno*, 521 U.S. at 867 (the order in *Pacifica* "targeted a specific broadcast").

¹⁷ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 683 (1994) (O'Connor, J., concurring in part and dissenting in part) (citation omitted) ("*Turner I*"); see *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1110 (D. Utah 1985) (impact of indecency time channeling is far more burdensome for cable network than for broadcast station), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); cf. *Becker v. FCC*, 95 F.3d 75, 82, 84 (D.C. Cir. 1996) (time channeling relegates programming to "broadcasting Siberia," deprives speakers of their "preferred audience" and "inevitably interfere[s] with * * * freedom of expression").

clearly establishes that government's failure to provide a coherent standard magnifies the restrictiveness of Section 505.¹⁸

Unable to deny that Section 505 restricts protected speech, J.S. 18 n.6, the government asserts that the time channeling regulation upheld in *Pacifica* is more restrictive than Section 505 because it "directly regulated a desired communication, rather than . . . a byproduct (signal bleed) of a communication."¹⁹ But this is a *non sequitur*. Appellants' characterization of signal bleed does not make Section 505 any less of a direct restriction on speech; nor does it deny that the law imposes a de facto 16 hour per day ban on adult networks in most cable systems. J.S. App. 17a. It is merely an attempt to imply that signal bleed may be more intensively regulated as a "secondary effect[]" -- an argument that was thoroughly analyzed, and debunked, by the district court. *Id.* at 24a-25a; see also *Reno*, 521 U.S. at 867; *Boos v. Barry*, 485 U.S. 312, 320-321 (1988) ("Regulations that focus on the direct impact of speech on its audience * * * are not the type of 'secondary effects' we referred to in *Renton*."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214-215 (1975).

Finally, in seeking to apply *Pacifica* wholesale to cable television, the government ignores an important distinction between the broadcast and cable media. The broadcasting "safe harbor" rules historically were based on the fact that blocking

¹⁸The government argued that even safe sex materials should be considered indecent if presented on Playboy Television, Defs.' Post-Trial Br. at 67-69, directly flouting this Court's concern in *Reno* that a vague indecency standard could restrict the presentation of safe sex instructions and would chill material that contains "any of the seven 'dirty words' in the *Pacifica* monologue." 521 U.S. at 854, 870-872, 877-879. This issue would provide an independent reason to affirm the decision below if this case were to be accepted for full briefing and argument.

¹⁹J.S. at 16-17. The government also claims that the regulation upheld in *Pacifica* is more restrictive because it does not allow broadcasters the alternative of blocking. However, Section 505 is no less burdensome because cable operators are provided an even more restrictive option that the district court found offered "no practical choice." J.S. App. 17a.

technology did not exist for radio or for free television.²⁰ Accordingly, whatever First Amendment burdens that resulted from the broadcasting safe harbor were more easily justified in that specific context because there was no other way to address the government's concern. With cable television, however, as this Court discussed in some detail in *Denver*, 518 U.S. at 755-757, various options including lockboxes exist and must be provided free to the subscriber upon request under § 504. Further, the district court found that installation of a blocking device under Section 504 effectively "eliminate[s] reception both of undesired channels and of undesired signal bleed." J.S. App. 10a. This difference, in addition to the inherent burdens of time channeling, renders Section 505 far more restrictive than necessary even under intermediate First Amendment review.

2. The Government Did Not Show That the Recited Concerns Are Real, Not Conjectural, or That Section 505 Will Alleviate the Purported Harms

Questions of its restrictiveness aside, Section 505 flunks intermediate First Amendment scrutiny for an even more basic reason. The district court's factual findings amply reveal that the government failed to demonstrate "that the recited harms [to be addressed by Section 505] are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664 (internal quotation marks and citation omitted); see *Denver*, 518 U.S. at 766 (plurality op.) ("[i]n the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it"); *Reno*, 521 U.S. at 858 n.24. (noting the lack of legislative investigation preceding passage of the Communications Decency Act). After two years of

²⁰See *In re Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5309 (1990) (separating children from adults in the broadcast audience is an "impossibility"); see also *id.* at 5305 ("parents' control of children's television viewing * * * differs from parental control of cable viewing."); *Denver*, 518 U.S. at 775 (Souter, J., concurring) ("broadcasts [are] * * * difficult or impossible to control without immediate supervision").

litigation involving extensive discovery and two full hearings with extensive expert testimony, the district court concluded that "the Government has not convinced us that [signal bleed] is a pervasive problem." J.S. App. 36a.

The legislative history provides no evidence to support the government's position. Section 505 was adopted as an eleventh hour amendment to a comprehensive telecommunications bill without discussion, supported only by the sponsors' unadorned assertion that "numerous" cable systems failed entirely to scramble their signals on adult channels. See 141 Cong. Rec. S8167. There were no hearings, debates, or congressional findings before Congress voted on the amendment. Moreover, no testimony or other evidence ever suggested that children would be harmed in any way by occasional or fleeting exposure to garbled cable signals.²¹ When the district court granted the temporary restraining order in this case, it noted that "the legislative record contains no findings as to how often this bleeding occurs, how many minors are exposed to the adult programming when the bleeding occurs or what effect such exposure has on minors." App. 15a-16a; see also *id.* at 15a (noting "an absolute void of legislative findings"). At the preliminary injunction stage the court similarly pointed out that there had been "no debate on the amendment and no hearings," J.S. App. 54a, and it called on the government to provide "more specific evidence of the number of households with the potential for signal bleed" at the hearing on a permanent injunction, *id.* at 53a & n.16.

This Court has approved the use of judicial proceedings to supplement the abstract concerns of Congress where the

²¹The government's argument that it need not present "scientific evidence" of harm, J.S. 20-21 n.7, misses the point. Although the psychological evidence was in dispute in the proceedings below, the district court was also concerned about the lack of evidence that "the effects of viewing signal bleed of sexually explicit television are the same as viewing sexually explicit television outright." J.S. App. 29a; see *Sagittarius Broad. Corp.*, 7 FCC Red. 6873, 6874 (1992) (concern over indecency is not present where sexual import of material is "barely intelligible, much less inescapable to adults" so that those who randomly tune in would be unlikely to "continue listening" or unlikely to "discern the [material's] sexual meaning").

legislative history lacks the necessary factual findings. *Turner I*, 512 U.S. at 664-668. Indeed, this Court narrowly upheld the constitutionality of must carry regulations after a comprehensive record was compiled on remand. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-196 (1997) ("*Turner II*"). However, the differences between *Turner* and this case are highly instructive:

- Must carry rules were enacted only after years of detailed study, *Turner I*, 512 U.S. at 632; *Turner II*, 520 U.S. at 199 (Congress heard "years of testimony, and review[ed] volumes of documentary evidence and studies"), whereas Section 505 was adopted despite an "absolute void" of legislative findings.
- To support must carry rules, the FCC conducted a "contemporaneous study" of television stations that had been dropped from cable systems, *Turner II*, 520 U.S. at 203, whereas here, the government could identify only 72 specific complaints "which the FCC believes are at least potentially related to indecent or sexually explicit cable programming" out of "33,000 informal written complaints about cable service generally." Pl.'s Trial Ex. 119 (Defs.' Answer to Interrog. No. 2). And the 72 complaints did not all relate to "sexually-oriented" channels or to the issue of signal bleed, but to programming on networks as diverse as HBO, Cinemax, The Movie Channel, Showtime, MTV, E!, CNN, Bravo, The Disney Channel, Viewer's Choice, A&E and Nickelodeon. Pl.'s Trial Ex. 43.
- In *Turner*, the legislative record in support of must carry rules was supplemented by an additional 18 months of factual development in the courts "yielding a record of tens of thousands of pages of evidence" that included congressional findings, expert submissions, sworn declarations and industry documents. *Turner II*, 520 U.S. at 187 (internal quotation omitted). Here, however, after two years of litigation the government presented "no evidence on the number of households actually exposed to signal bleed," and managed to compile anecdotal evidence comprising "only a handful of isolated incidents over the 16

years since 1982 when Playboy started broadcasting." J.S. App. 11a-12a.

Ultimately, the government's evidence in support of Section 505 amounted to accounts of two city councillors, eighteen individuals, one United States Senator and the officials of one city. J.S. App. 11a. In *Denver*, this Court found similar evidence to be inadequate to support restrictions on indecent programming on public access channels. Although the record contained "anecdotal references to what seem isolated instances of potentially indecent programming," the plurality found that "these few examples do not necessarily indicate a nationwide pattern." *Denver*, 518 U.S. at 764 (plurality op.). The *Denver* plurality concluded that "the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end." *Id.* at 766. The same conclusion is warranted here, where the government failed to show that signal bleed is a pervasive problem. See Richard Posner, *Obsession*, NEW REPUBLIC, Oct. 18, 1993 at 34 ("in a nation of 260 million people, anecdotes [to establish problems of pornography] are a weak form of evidence").

Nor did the government demonstrate that imposing the "safe harbor" under Section 505 "will in fact alleviate [the] harms [of signal bleed] in a direct and material way." *Turner I*, 512 U.S. at 664; *Denver*, 518 U.S. at 766 (plurality op.) ("we cannot assume that the harm exists or that the regulation redresses it"). Appellants have assumed that the safe harbor will serve their stated interests, but the basis for this assumption is undermined by the factual findings below and by the government's own position. The district court pointed out, for example, that "a resourceful minor can still watch signal bleed after the safe harbour hours." J.S. App. 37a. Moreover, the same factor that prompted the government in this case to describe the safe harbor as a "modest" restriction (J.S. 18 n.6) -- "the easy availability of VCR machines" -- undermines its assumptions as to the effectiveness of Section 505 to protect children. The FCC in the past has concluded that time channeling is ineffective to protect children from indecent

programming because of VCRs in children's rooms.²² The district court should be summarily affirmed where, as here, the regulation of speech at issue provides only limited or incremental support for the interest asserted. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60, 73 (1983); *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984).

C. The District Court Correctly Held that Section 505 is More Restrictive Than Section 504

In holding that Section 505 is not the least restrictive means, the district court straightforwardly applied settled law. J.S. App. 32a-39a. Under traditional First Amendment analysis, the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Here, the court below found that Section 505 required cable operators "to prevent [signal] bleed in all non-subscribing households, irrespective of whether a household has children," and that "two-thirds of all households in the United States have no children." J.S. App. 33a-34a. Additionally, the district court noted that Section 504 is not content-based, *id.* at 35a, and that the existence of a content-neutral alternative "undercut[s] significantly" any defense of a content-based statute. *Boos v. Barry*, 485 U.S. at 329. It concluded that "§ 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights."²³

²² *Implementation of Section 10 of the Cable Consumer Protection & Competition Act of 1992*, 8 FCC Red. 998, 1009 (1993) (Commission expressly declined to adopt time channeling for leased access programming under the 1992 Cable Act); *Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Red. at 5306-07 (time channeling is ineffective because of VCRs in children's rooms).

²³ J.S. App. 38a. To ensure that cable subscribers have adequate notice of their rights under Section 504, the district court directed Playboy to work with MSOs to provide such notice. Appellee has taken no position on the legality of such a command, and did not file a cross-appeal to this aspect of the decision below. In any event, Playboy's extensive arrangements to provide the contemplated notice

Appellants erroneously characterize this holding as a "particularly rigorous" application of strict scrutiny, J.S. 16, and criticize the court below for relying on a "hypothetical, enhanced version of section 504" in its analysis, *id.* at 18. The government argues that voluntary measures, even with "adequate notice," are ineffective, noting that very few cable subscribers (less than one percent) have obtained blocking devices." *Id.* at 16. And it asserts that if such measures became effective they would be more restrictive than Section 505 because "the number of subscribers requesting blocking could be expected to exceed the minimal number necessary to make carriage of the sexually explicit channels uneconomical." *Id.* at 19. Finally, the government claims that voluntary solutions are insufficient, because they fail to serve society's "independent interest" in protecting children from sexually-oriented material. *Id.* at 22. These arguments are baseless.

The government's repeated complaint about Section 504 with notice as being "hypothetical" or "uncertain" is most curious since courts routinely consider potential alternative measures. See *Reno*, 521 U.S. at 855 ("the evidence indicates that 'a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be available'") (citation omitted); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130 (1989) ("[f]or all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective"). Quite obviously, the least restrictive means analysis calls upon courts to anticipate measures Congress might employ to achieve its stated goals, and it does not require that such measures actually be adopted and proven effective. See, e.g., *id.* at 129-130 (government has the burden to prove that its restrictions on speech are the least restrictive alternative). That Congress could have enacted an enhanced notice requirement for Section 504 here, not

are described in Playboy's Combined Opposition To Defendants' Post-Trial Motions at 13-14.

that it did so, is what undermines Section 505.²⁴ If the law were otherwise, Congress could censor speech at will merely by refusing to enact less restrictive alternatives.

In *Denver*, this Court invalidated mandatory blocking and segregation requirements for indecent speech on leased access channels. Acknowledging that no regulatory provision "short of an absolute ban" on indecent speech will completely protect children from potential exposure, *Denver*, 518 U.S. at 759 (plurality op.), this Court compared the various restrictions contained in the 1984 Cable Act (lockboxes), the 1992 Cable Act (segregation and blocking of indecent leased access programs) and the Telecommunications Act of 1996 (Sections 504, 505 and the V-chip requirement) and found that the blocking and segregation requirement was excessively restrictive, *id.* at 757-758 (plurality op.).²⁵ This Court stressed that "we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as *some indication* that more restrictive means are not 'essential' (or will not prove very helpful)." *Id.* at 758 (plurality op.) (emphasis in original) (citing *Boos v. Barry*, 485 U.S. at 329). The same analysis applies to Section 505.

Contrary to the Appellants' argument here, this Court in *Denver* did not conclude that the deficiencies of lockboxes, including the possibility of "inattentive parents," showed the need for mandatory restrictions. 518 U.S. at 758 (plurality op.). Indeed, the Court concluded that any perceived problems raised by the government should be cured by less burdensome means, such as informational requirements, a simple coding system, or readily available blocking equipment accessible by telephone. *Id.* at 759.

²⁴ Because a reviewing court may postulate possible alternative regulations, the district court's directive that Playboy provide "effective notice" of Section 504 is not essential to the decision. It is sufficient that Congress might have adopted such a requirement.

²⁵ This Court mentioned Section 505 as one potentially less restrictive alternative in *Denver* because it analyzed the Communications Act "as recently amended." 518 U.S. at 756. However, it emphasized that the constitutionality of Section 505 and other Telecommunications Act provisions was not before it, and it was not deciding "whether the new provisions are themselves lawful." *Id.*

In short, notwithstanding Appellants' complaints, the district court's contemplation of an "enhanced" Section 504 is fully supported by precedent.

The government's suggestion that the relatively low rate of lockbox distribution, J.S. 9, 16, shows the ineffectiveness of voluntary measures ignores the lack of proof of the pervasiveness of signal bleed.²⁶ Because Appellants could locate only a handful of anecdotal accounts of signal bleed in the 16 years Playboy Television has been on the air, the court below quite reasonably concluded that "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." J.S. App. 36a. The important point here is not how many lockboxes have been distributed, but that, in the cases in which the government was able to find a problem, Section 504 was effective in solving it. J.S. App. 12a ("[i]n each instance, the local MSO offered to, or did in fact, rectify the situation for free (with the exception of 1 individual), with varying degrees of rapidity").²⁷

Nor is there any substance to Appellants' speculative claim that an enhanced Section 504 is in reality more restrictive than Section 505 to the extent "adequate notice" might prompt cable operators

²⁶ Appellants' disenchantment with voluntary parental empowerment measures also contradicts the only congressional findings on the subject. Congress found that parents have and will take an active role in supervising their children. Telecomms. Act of 1996 § 551(a)(7) ("[p]arents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control . . .") (reprinted at 47 U.S.C. § 303 note). Voluntary measures, according to Congress, such as "[p]roviding parents with timely information about the nature of upcoming video programming," provide a "nonintrusive and narrowly tailored means" of empowering parents. *Id.* at (a)(9); see also 47 U.S.C. § 544(d)(3) (notice requirement permits parents to block free access by non-subscribers to premium cable channels that provide films rated X, NC-17 or R).

²⁷ The government's analysis also ignores the fact that other alternatives to control programming now exist. J.S. App. 10a. ("modern TVs and VCRs have both lockout and V-chip features by which a consumer can program the TV or VCR to block reception either of an undesired channel or of offensive types of programming"); cf. *Reno*, 521 U.S. at 854-855 (anticipating private, voluntary use of filtering software).

to drop adult networks.²⁸ First, there is zero factual support for the government's assertions that the number of actual requests for blocking devices "could be expected" to make adult channels uneconomical and that an enhanced version of Section 504 "would likely lead to at least the same restriction of speech as does Section 505." J.S. 19. It strains credulity to assume that enhanced notice requirements would increase the number of complaints from the "handful of isolated incidents" in the record below, J.S. App. 11a-12a., to the millions that would be required to make adult channels uneconomical.²⁹ Second, as a matter of law, such economic choices are not more restrictive. See *Denver*, 518 U.S. at 746-747 (plurality op.) (provision that allows cable operators to drop indecent programming and "create[s] a risk that a program will not appear" is "significantly less restrictive" than mandatory time channeling). Third, the argument is based upon a false dichotomy. The choice is not whether Section 504 may be more restrictive than Section 505; it is whether Section 504, standing alone, is more restrictive than Sections 504 and 505 together.

Finally, Appellants' claim that an "enhanced" version of Section 504 "ignore[s] society's independent interest in seeing to it that children are not exposed to sexually explicit materials" misapprehends both the law and the facts of this case. J.S. 22. The government assumes for purposes of this argument that Section 504 with notice "would be sufficient to inform parents of the problem of signal bleed and to permit them to eliminate it easily and effectively." *Id.* Yet it cannot show that the "independent interest" in protecting children is not protected by Section 504 even without "enhancement." See J.S. App. 12a. Since the government never demonstrated the pervasiveness of the signal bleed problem, yet acknowledges that Section 505 is a restriction on Playboy Television during "the hours when most people want to see such programming," J.S. 18 n.6, this argument

²⁸ Of course, if Appellants were correct, they could not claim that children would be harmed if the decision below is affirmed.

²⁹ Six percent of the 62 million cable television households in the United States — the number used in the government's "break-even" analysis — is equal to 3.72 million households.

flies in the face of the bedrock principle that the government's interest in protecting children from indecent materials "does not justify an unnecessarily broad suppression of speech addressed to adults." J.S. App. 33a; *Reno*, 521 U.S. at 874-875.

There is no legal support for Appellants' argument that the government may restrict protected speech despite the existence of effective voluntary protections because some parents may "fail to exercise their own authority." J.S. 22. This Court addressed the identical question in *Denver*, (including the problem of "inattentive parents") and decided that voluntary solutions are constitutionally superior to mandatory restrictions, even if children may not be completely shielded from potential exposure. Appellants' position here is contrary to the clear weight of precedent. *Reno*, 521 U.S. at 875; *Bolger*, 463 U.S. at 73-74; *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 730 (1970).

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION REGARDING THE DISTRICT COURT'S DISMISSAL OF APPELLANTS' POST-TRIAL MOTIONS

This Court should summarily affirm the district court's dismissal of Appellants' post-trial motions because the government fails to even assert, much less prove, the existence of a substantial federal question. Appellants filed a post-trial motion, pursuant to Rule 59(e), Fed. R. Civ. P., to alter or amend the judgment by limiting relief solely to Playboy, as well as a motion to correct judgment, pursuant to Rule 60(a), seeking to add the district court's "effective notice" language to the Order. The district court properly dismissed both post-trial motions for lack of jurisdiction. J.S. App. 91a.

The district court was clearly correct. Appellants' argument violates the well-settled rule that "[t]he filing of a notice of appeal is an event of jurisdictional significance," and that a federal district court and a reviewing court "should not attempt to assert jurisdiction over a case simultaneously." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). By noticing its appeal, the government deprived the district court of jurisdiction

to consider its post-trial motions. *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389, 390 n.2 (1982). As the leading Supreme Court procedure treatise makes clear "[a]n attempt by the district court to change the judgment after a notice of appeal from its ruling has been filed is ineffective." Robert L. Stern, Eugene Gressman, et al., *SUPREME COURT PRACTICE* 392 (7th ed. 1993).

The government here claims that simultaneous jurisdiction is appropriate, asserting that its first Notice of Appeal was effective but that it did not deprive the district court of jurisdiction. J.S. 25. The basic flaw in this argument, apart from the fact that this case is not governed by Rule 4, Fed. R. App. P., is that the government was not seeking to alter some collateral issue in its post-trial motions but raised issues that went to the heart of the district court's order.³⁰ In particular, Appellants' Rule 59(e) motion to limit relief to Playboy would have effectively converted Appellee's facial challenge to an as applied challenge of Section 505. It is no answer to suggest that there is "no chance" that the lower court would be acting on a post-trial motion at the same time as this Court because the appellant is allowed 60 days to file a jurisdictional statement. J.S. at 28. The district court may take more than the allotted time to issue a decision, and the appellant may file its jurisdictional statement early. In any event, for the purpose of preparing a jurisdictional statement, it is impossible to determine what substantial federal questions have been raised if the judgment may be altered in the interim.

³⁰ Appellants' citation of *League of Women Voters* is of no help. There, this Court made quite clear that it could exercise simultaneous jurisdiction in that case only because the post-trial motion was entirely collateral and "uniquely separable from the cause of action." 468 U.S. at 373-374 n.10 (citation omitted). The post-trial motion there had no effect on "the prompt determination by the court of last resort of disputed questions of constitutionality of acts of the Congress." *Id.* (citation omitted). *League of Women Voters* is particularly inapt here, since the Telecommunications Act established an expedited appeal procedure for the very purpose of permitting this Court to rule on disputed questions of constitutionality of an act of Congress. Telecomm. Act of 1996 § 561(b) (reprinted at 47 U.S.C. § 223 note).

Here, there is virtually no suggestion that the district court's decision to dismiss the post trial motions presents a substantial question that requires this Court's attention. Indeed, the government characterizes its own post-trial motions as seeking to correct a "clerical mistake[]," which "arguably did not seek to alter the rights adjudicated." J.S. 26 & n.10. Appellants assert only that the question is of substantial significance because other litigants may be uncertain under current Court rules about how to preserve both their right to appeal and to obtain postjudgment relief in cases where there is a direct right of appeal. *Id.* at 28. Not only is the significance of this question entirely speculative,³¹ but the controversy arises from a perceived ambiguity in Rule 18.1 that would be more sensibly resolved by resort to this Court's discretion to clarify its own rules than to its appellate jurisdiction.

CONCLUSION

For the foregoing reasons, Appellee respectfully urges this Court to affirm the decision of the district court.

Respectfully submitted,

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³¹Only a handful of cases arise each year under this Court's direct appellate jurisdiction since Congress repealed the principal statutes requiring the use of three-judge district courts in the 1970s. Robert L. Stern, Eugene Gressman, et al., *SUPREME COURT PRACTICE* at 56. This is not to suggest that some other case might not present a substantial federal question where this one does not, but the small numbers indicate how little "uncertainty" to expect.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94/96-107 JJF
Consolidated Actions

PLAYBOY ENTERTAINMENT GROUP, INC., GRAFF PAY-PER-VIEW
INC., PLAINTIFFS

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF
JUSTICE, JANET RENO, ATTORNEY GENERAL, FEDERAL
COMMUNICATIONS COMMISSION, DEFENDANTS

Mar. 7, 1996

OPINION

/s/ JOSEPH J. FARNAN JR.
FARNAN, District Judge

I. INTRODUCTION

Presently before the Court is the Application for a Temporary Restraining Order filed by Playboy Entertainment Group, Inc. ("TRO") (D.I. 3).¹ Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Playboy seeks to prevent Defendants the United

¹ Subsequent to the filing of the instant action, Graff Pay-Per-View, Inc. filed a similar action against Defendants. See *Graff Pay-Per-View v. Reno*, C.A. 96-107-JJF. Simultaneously with the filing of its Complaint, Graff filed an Unopposed Motion to Consolidate its action with the instant action. The Court entered an Order granting Graff's motion.

States, the United States Department of Justice, Attorney General Janet Reno, and the Federal Communications Commission ("FCC")² from implementing or enforcing Section 505 of the Telecommunications Act of 1996 (the "Act")³ pending a preliminary injunction hearing before a three-judge court.⁴ Playboy contends that Section 505 of the Act violates the First Amendment and the Equal Protection Guarantee of the Fifth Amendment of the United States Constitution. The Government opposes the granting of a TRO on the grounds that Playboy has failed to satisfy the TRO standards necessary to bar the enforcement of an Act of Congress. (D.I. 21 at 3.) As provided in the Act, Section 505 becomes effective on March 9, 1996, 30 days after it was signed by the President.

The Court has jurisdiction over this matter pursuant to Section 561 of the Act. This Opinion shall constitute the Court's Findings of Fact and Conclusions of Law.

II. BACKGROUND

A. Section 505 of the Telecommunications Act of 1996

Section 505 provides in its entirety:

SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT. In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and

² The Court will refer to the Defendants as the "Government."

³ Section 505 of the Telecommunications Act will be codified at 47 U.S.C.A. § 641.

⁴ Section 561 of the Act requires that facial challenges to the Act's constitutionality must be heard by a district court of three judges empaneled pursuant to 28 U.S.C. § 2284.

audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) IMPLEMENTATION. Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) DEFINITION. As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

Section 505 requires a video programming distributor ("a cable operator") to scramble "sexually explicit adult programming or other programming that is indecent" which is transmitted on a channel "primarily dedicated to sexually oriented programming," often referred to as an "adult network." Section 505 requires that any such channel must be fully scrambled regardless of whether scrambling has been requested by the customer. If a cable operator does not or cannot comply with this requirement, it is prohibited from transmitting the adult channel programming ("block requirement") during hours of the day when minors are most likely to view it. Section 505 provides that said hours shall be determined by the FCC.⁵ Cable operators must be in full compliance with the Section 505 blocking requirements by March 9, 1996, or risk exposure to possible enforcement by the Government and resulting penalties.

⁵ See Order and Notice of Proposed Rulemaking amending 47 C.F.R. § 76 (F.C.C., effective March 9, 1996). By this action, the FCC has set the hours of 10 p.m. to 6 a.m. for adult programming as contemplated by Section 505. *Id.* at III.A.

B. History of Section 505

The Telecommunications Act of 1996, enacted on February 9, 1996, resulted from a Congressional effort spanning several years to restructure the telecommunications industry. Extensive debates and hearings were held by both the United States Senate and House of Representatives on numerous issues addressed by the Act, although no hearings were held with regard to the provisions of Section 505.

During the final days of Congress' consideration of the Telecommunications Act, Senator Diane Feinstein of California, on her behalf and on behalf of Senator Trent Lott of Mississippi, introduced Amendment 1269 which ultimately became Section 505 of the Act. Although Senator Feinstein spoke at length about the amendment at the time of its introduction, no hearing or debate was held, and the amendment was voted upon and passed the same evening as its introduction. 141 Cong. Rec. S8167 (daily ed. June 12, 1995).

Senator Feinstein, in addressing the Senate, stated that the blocking requirements required by the amendment were "rather simple and direct . . . [and] commonsense" The Senator asserted that such an amendment was needed despite other provisions of the Act that addressed similar concerns.⁶ In support of this assertion, Senator Feinstein cited a communication she received from a local city councilman from Poway, California, a suburb of San Diego, who told the Senator that 320,000 cable customers in the Poway area were receiving unscrambled and sexually explicit audio and video cable programming although they had not subscribed to it. Senator Feinstein observed that the Poway experience was not an isolated incident. The Senator noted that in Washington, D.C., unscrambled sexually explicit pornography had been transmitted to non-subscribing cable customers. Although the Senator acknowledged that the National

⁶ Specifically, Section 504 of the Act requires that "[u]pon request by a cable service subscriber, a cable operator, shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it." Section 504(a).

Cable Television Association had adopted guidelines concerning such transmissions (*see* Aff. D. Brenner ¶ 4), the Senator found that these endeavors were insufficient:

The problem is that there are no uniform laws or regulations that govern such sexually explicit adult programming on cable television. Currently, adult programming varies from community to community, as does the amount and effectiveness of scrambling on each local cable system. Right now, it is up to the local cable operator to monitor itself. This is like the fox guarding the hen house.

. . . the voluntary guidelines simply recommend that local cable operators "block the audio and video portions of unwanted sexually-oriented premium channels at no cost to the customer, upon request." While this is a somewhat commendable effort on the part of the industry, I do not think it goes far enough.

I do not believe that sexually explicit adult programming should automatically be broadcast into a program subscriber's home. On the contrary, I believe that sexually explicit programming should be automatically blocked, unless a program subscriber specifically requests the programming.

In response to the cable industry's concerns about technology problems and extraordinary fiscal costs that the amendment would impose on them, Senator Feinstein advised:

The bottom line, however, is that fully scrambling both the audio and video portion of a cable program is technologically feasible With regard to their fiscal concerns, I have never been given any information from the industry to document what the actual costs to cable operators would be.

Senator Feinstein concluded that the amendment gave cable operators options, and the fact that the operators had 30 days to comply gave them ample time:

... the amendment leaves it up to the local cable operator on how and when to come into full compliance

This amendment also does not become effective until 30 days after enactment, so cable operators will have plenty of time to either fully block the programming, or restrict access to certain times of the day.

Id.

Senator Lott, addressing the Senate after Senator Feinstein, emphasized that he did not "want to exaggerate what this amendment will do. It simply requires cable operators to fully scramble sexually explicit programming if someone has not subscribed for such programming." *Id.* at S8169.

Attached to the legislative record, although apparently not discussed on the floor, is a memorandum from a legislative attorney for the American Law Division of the Congressional Research Service, Library of Congress, which opined as to the constitutionality of the proposed amendment. *Id.* at S8168. The legislative attorney reviewed current legal standards concerning restrictions on cable television. He concluded that the amendment was constitutional; however, he cautioned that the phrase "during hours of the day (as determined by the Commission) when children are most likely to view it" could be found to be overly broad, noting that this provision might have to be modified to "prohibit such programming when the ratio of children to adults is significantly high." *Id.*

The amendment passed by a unanimous vote.

C. The Fundamentals of Cable Television Programming

Cable television is a service that presently can provide cable customers with a choice of over 100 channels of programming. Unlike broadcast television,⁷ cable television is available only to

⁷ Broadcast television uses a signal received by household antenna via airwaves, whereas cable television uses cables.

those customers who choose to pay for it. Subscribers may choose from several available "packages." For example, "basic" cable service generally includes several broadcast stations, their local affiliates, and additional channels such as the Discovery channel, A&E television, CNN and C-Span. Customers may choose other "premium" packages which provide additional programming channels, such as HBO/Cinemax, Showtime/The Movie Channel and Playboy Television. Additionally, many cable system operators offer Pay-Per-View programming, in which subscribers may view a certain movie at a certain time on their television for a set fee.

The technology involved in cable television is fairly straightforward. Signals from various sources such as master antennas, satellites, or local television studios are received by the cable operator and then transmitted by the cable operator from its facility to customers' houses. The cable operator transmits the signals to customers through coaxial cable. (Aff. Ciciora ¶ 5.)⁸

From the inception of cable television systems, coaxial cables have provided the capacity to carry many more channels of television programming than can be provided by broadcast television channels. (Aff. Ciciora ¶ 6.) For example, because of interference from stations operating on the same channel in other communities and from stations operating on adjacent channels in the same community, the number of broadcast channels available over the airways in one community could not exceed seven (as in New York City) and rarely exceeded three or four. Because cable systems did not use the airwaves, they did not experience channel interference problems and therefore could transmit programming over their entire 12-channel capacity. (Aff. Ciciora ¶ 7.) With the advent of satellite-delivered programming, cable systems began to expand the capacity of their coaxial transmission facilities to 36, 54 and even 100 channels.

⁸ Walter S. Ciciora was Vice President, Technology, Time Warner Cable from 1989 to 1993, and in that capacity was primarily responsible for cable technology matters. (Aff. Ciciora ¶ 2)

As more households subscribed to cable television and more cable systems increased their channel capacity beyond the 12 channels, television set manufacturers began making "cable-ready" or "cable-compatible" television sets. These sets are capable of directly tuning the nonbroadcast channels typically used by cable systems. Cable subscribers who own cable ready television sets do not need converter devices to tune those channels, unless the audio or video signals are scrambled by the cable system. (Aff. Ciciora ¶ 9.)

**D. Practical and Technical Difficulties with
Compliance Under Section 505 as Alleged by Playboy**

Playboy acknowledges that scrambling and other technologies exist to comply with the provisions of Section 505; however, it asserts that the existing options either fail to fully block the non-subscribed programming or are impossible to install by March 9, 1996.

According to Playboy, all existing cable operators employ technology to protect their premium and pay-per-view channels ("premium services") so that only paid subscribers will be able to receive and view those channels. (Aff. Ciciora ¶ 10.) This technology takes one of three forms and is intended to prevent the audio or video signals of the cable channels from being seen or heard by non-subscribers. These three methods are the installation of: 1) a "scrambler"; 2) a "trap" or a "parental lockout feature ("lockbox")" or 3) substituted video/audio with lockbox. (Aff. Ciciora ¶¶ 11, 16, 22.)

The first option, scrambling, prevents video transmission of the non-subscribed channels, but fails to prevent audio transmission unless additional technology, called "mapping" is used. Scrambling is the implementation of any of a variety of means employed at the "headend" or cable system transmission facility (to distinguish between devices employed at the individual household level) that alters a portion of the television signals so that the picture on the receiving television is impaired. Subscribers to premium networks receive a converter/descrambler (commonly called an "addressable converter") that has the ability to descramble the video alterations and restore the picture. (Aff.

Ciciora ¶ 11.) While the audio portion of a signal can also be scrambled at the headend, most manufacturers of scrambling equipment manufacture only headend equipment and converter boxes capable of scrambling and descrambling video, not audio signals. Consequently, the audio portion of a signal is rarely, if ever, scrambled at the headend. (Aff. Ciciora ¶ 12.)

Thus, when used alone, scrambling fails to suppress the audio of the unwanted channels (absent the use of mapping converters). In addition, scrambling can also fail to prevent the bleeding of the unwanted video signal of adult channels onto the television screens of "basic" programming customers. To prevent this bleeding of non-subscribed programming to the screens of basic customers, cable operators can utilize a "trap" or "lockbox" option.

A "trap" is a piece of hardware that is installed on the cable line coming into a basic programming customer's house. A "negative" trap removes or filters a designated channel signal from a group of incoming channel signals. In the alternative, a converter/descrambler or a lockbox containing traps or filters can be installed on all customers' televisions and VCRs. (Aff. Ciciora ¶ 16.)

Finally, cable operators can prevent cable customers from receiving non-subscribed programming by the use of newer versions of converter/descramblers which substitute alternative video and audio for the scrambled signal. These devices are referred to as a lockbox and permit a parent, through the use of a parental key or personal identification number, to block a television set from receiving the audio or video signal from any selected channel. This technology costs approximately \$115.

Playboy offered the testimony of Wayne Hall, Vice President of Harron Communications Corporation ("Harron") to establish the difficulties facing a cable operator seeking to comply with Section 505. By affidavit, Mr. Hall testified that Harron has 245,000 cable subscribers in a seven-state area, approximately 123,000 of which have addressable converter/descramblers. Harron provides all its subscribers, upon request, with a converter/descrambler having a parental lockbox feature. Although Harron rarely receives

complaints about the bleeding of audio or video signal from any premium channel, in order to comply with Section 505 Harron would have to provide blocking devices to approximately 122,000 households that do not presently have them. With only one installer for every 2,500 customers, Mr. Harron testified that it would be impossible for Harron to install blocking devices on those households without a lockbox within any 30 day period, let alone by March 9th. Thus, according to Playboy, if Section 505 is implemented, the only economically viable solution for Harron would be to remove its adult oriented programming except for the late-night hours designated by the FCC for such programming. (Aff. Hall ¶¶ 1-10.)

E. Description of The Playboy Networks

Playboy produces and distributes cable video programming through its two programming networks, Playboy Television and AdulTVision ("the Playboy networks"). The Playboy networks are provided only to adult cable subscribers and only upon request. Playboy also produces and/or licenses, on an exclusive or non-exclusive basis, its programming for use on other major premium networks such as Showtime/The Movie Channel and HBO/Cinemax. According to Playboy, it is not uncommon for the same programming to be shown by both Playboy Television and other non-adult oriented premium or Pay-Per-View networks such as Showtime/The Movie Channel, HBO/Cinemax, Viewer's Choice/Hot Choice, or Action Pay-Per-View. (Aff. Lynn ¶¶ 4, 6, 10-12.)⁹

In addition, Playboy asserts that Playboy Television offers a wide variety of programming, consisting of lifestyle information, news, music, video fiction and short stories, comedy, and other programming that is not sexually explicit. In addition to its regular programming, Playboy contends that Playboy Television provides special programming such as its recent December 1, 1995 four-hour programming on AIDs awareness and safe sexual practices which was done in connection with the World AIDS Day

⁹ Anthony J. Lynn is President, Playboy Entertainment Group and Executive Vice President, Playboy Enterprises. (Aff. Lynn ¶ 1.)

created by the World Health Organization in 1988. (Aff. Lynn ¶ 9.)

Playboy states that it has standards and guidelines it uses in determining what programming will be suitable for the Playboy networks. Playboy contends that its standards and guidelines are designed to eliminate any material that can be deemed patently offensive. In order to implement its standards Playboy employs four in-house lawyers who allegedly review all Playboy programming to ensure that it is neither obscene nor violative of any community standards. (Aff. Lynn ¶ 14.)

Playboy asserts that no court or administrative agency in any jurisdiction has ever found that the Playboy networks or any of their programming to be either obscene or harmful to minors. Similarly, Playboy contends, in over forty years of publication, not one issue of Playboy magazine has ever been found to be obscene or harmful to minors by any judicial or administrative system, state or federal. In support of this contention Playboy notes that the United States Attorney General's Commission on Pornography concluded that Playboy magazine is "plainly non-offensive." (Aff. Lynn ¶ 15.)

III. PARTIES CONTENTIONS

In this litigation, Playboy contends that it is entitled to a TRO against the implementation and enforcement of Section 505 the Act. Playboy contends that it is likely to succeed on the merits of the case, because (1) the First Amendment forbids the application of indecency regulations to television programming (D.I. 7 at 18); (2) the Government has not established any compelling governmental interest in support of Section 505 (D.I. 6 at 29); (3) the requirements imposed by Section 505 are content-based and are accordingly unconstitutional (D.I. 7 at 31); and (4) Section 505 does not constitute the least restrictive means of serving the government's interest (D.I. 7 at 40).

In addition, Playboy contends that it will suffer irreparable injury if the Defendants are not enjoined (D.I. 7 at 48); that the balance of interest between the parties supports the issuance of a

TRO (D.I. 7 at 50); and, finally, that the public interest supports the issuance of a TRO (D.I. 51).

In response, the Government contends that Playboy has failed to meet the standard required to enjoin the implementation of an Act of Congress. First, the Government argues that an Act of Congress cannot be enjoined absent a showing of compelling circumstances, and that in order for temporary injunctive relief to be granted, the Court must conclude that each of the four factors considered when ruling on a TRO weigh in favor of the plaintiff, which the Government contends Playboy cannot do. (D.I. 26 at 11.) The Government further contends that Playboy cannot establish that it has a likelihood of success on the merits because: (1) the Government has the authority to restrict access by children to indecency in cable television (D.I. 26 at 13); (2) Section 505 is supported by the Government's compelling interest in protecting minors from indecent televisions programming (D.I. 26 at 17); (3) Section 505 employs the least restrictive means available to further the Government's interests, in that other courts have upheld similar blocking and time-channelling including positive traps. Further, the Government argues that voluntary measures are ineffective, and Section 505 is not a prior restraint on free speech (D.I. 20-28); (4) Section 505 is neither vague nor overbroad (D.I. 26 at 28); and (5) Section 505 does not impermissibly discriminate against indecent programming on channels dedicated to sexually explicit programming (D.I. 26 at 32).

The Government also asserts that Playboy cannot meet the standard for a TRO because Playboy has not carried its burden of establishing irreparable harm. (D.I. 26 at 36.) Finally, the Government contends that the harm to the Government, and the public interest, outweighs Playboy's assertions of harm. (D.I. 26 at 42.)

IV. LEGAL STANDARD OF REVIEW

Four factors must be considered when ruling on a motion for temporary injunctive relief. Those factors are: 1) the likelihood that the applicant will prevail on the merits; 2) the extent of irreparable injury to the applicant as a result of the conduct complained of; 3) the extent of irreparable harm to the defendant

if temporary injunctive relief is granted; and 4) the public interest. *Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995); *S&R Corp. v. Jiffy Lube Int'l*, 968 F.2d 371, 374 (3d Cir. 1992). In order to grant an application for a temporary restraining order, the Court must conclude that each of the four factors weighs in favor of granting temporary injunctive relief. *Id.*

V. DISCUSSION

A. The Likelihood That Playboy Will Prevail on the Merits

1. Constitutional Standard of Review

The parties have agreed that at this juncture the strict scrutiny standard of constitutional review applies to Playboy's facial challenge to Section 505.¹⁰ The focus of a strict scrutiny review of an Act of Congress is to determine whether or not the legislation, in this case, Section 505 represents the least restrictive means of achieving the Government's interest. In this case, the Government's interest is to ensure that minors do not have access to non-subscribed adult programming on cable television. With this standard in mind, the Court will proceed to determine whether Playboy has met its burden to demonstrate that it is likely to succeed on the merits with regard to its assertion that Section 505 is unconstitutional.

2. Analysis of the Likelihood of Success on the Merits

After considering the record evidence and arguments presented by the parties, the Court concludes that Playboy has raised serious and substantial questions as to whether the blocking and FCC time requirements imposed on cable operators by Section 505 of the

¹⁰ In general, sexual expression which is indecent, but not obscene, is protected by the First Amendment to the United States Constitution. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). However, indecent speech may be regulated by the Government in order to promote a compelling interest, provided that the Government chooses the least restrictive means to further its articulated interest. *Id.* The least restrictive means will further the Government's interest through narrowly tailored regulations which do not unnecessarily interfere with First Amendment freedoms. *Id.*

Telecommunications Act of 1996 constitute the least restrictive means of achieving the Government's interest in regulating the accessibility of adult programming to minors. Playboy has established that Section 505 may unconstitutionally infringe upon its rights under the First Amendment. At this stage of the proceedings, the Court credits Playboy's assertion that substantially less restrictive means are available to serve the Government's purpose. For instance, Playboy's suggestion that the lockbox technology supplied by cable operators to customers who request it can be an effective and reasonable alternative to the methods dictated by Section 505.

Further, the Court concludes that implementation and enforcement of Section 505 may effectively force cable operators to air Playboy only after 10 p.m. Importantly, such action could occur in the absence of any examination of alternative means, either by Congress or through discovery in this litigation. Because of the obvious importance of First Amendment guarantees, at a minimum, the Court is convinced that further investigation is needed to properly examine the Playboy programming and the feasibility of using alternative technologies prior to permitting the implementation of Section 505.

Although this Court has addressed in a limited manner the merits of this litigation and found a likelihood of success has been demonstrated by the Plaintiff, the Court trusts that the parties understand that a full consideration of the constitutional questions presented here can only be addressed by the three-judge court empaneled to hear this matter.

3. Irreparable Harm

While the judicial power to stay an act of Congress is "an awesome responsibility calling for the utmost circumspection", *Heart of Atlanta Motel v. United States*, 85 S.Ct. 1, 2 (1964) (Black, J., in chambers), the judiciary's responsibility to enforce the First Amendment's express right of free speech is no less important. Accordingly, the United States Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690,

49 L.Ed.2d 547 (1976). Although a plaintiff does not establish irreparable harm simply by asserting a First Amendment violation, the Court of Appeals for the Third Circuit has held that the requisite harm is established where the plaintiff shows that an act of Congress has "a chilling effect on free expression." *American Civil Liberties Union, et al., v. Reno*, No. CIV. A. 96-963, 1996 WL 65464 (E.D. Pa. Feb. 15, 1996), citing *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989).

Based on the evidence before it, the Court concludes that Playboy has shown that implementation of Section 505 will have a "chilling effect" on the adult-oriented cable television industry. Through the submission of affidavits from industry executives, Playboy has shown that adult-oriented cable television will effectively be turned off upon the implementation of Section 505. In the Court's view, Playboy has established that the short, 30 day implementation period provided for in Section 505 does not allow adequate time for cable companies to acquire and install the required blocking devices. Additionally, record evidence establishes that the cost of installing such devices in every home which subscribes to cable television would be crippling to the cable companies. Furthermore, Playboy has adduced evidence that upon implementation of Section 505 many cable operators who carry Playboy programming will be forced to curtail their transmission of the adult programming to the FCC imposed hours of 10:00 p.m. to 6:00 a.m. The Court is persuaded that such a substantial reduction of viewing time will cause significant financial losses for both the cable companies and Playboy.

Conversely, the Court concludes that the Government has not established that irreparable harm to the Government's interest will result if temporary injunctive relief is granted. Although not required, there is an absolute void of legislative findings that Section 505 is necessary to protect minors from exposure to sexually oriented material shown on adult cable channels which their parents have chosen not to subscribe to. While it is undisputed that video and audio signals of adult programming channels occasionally bleed into the homes of nonsubscribers, the legislative record contains no findings as to how often this bleeding occurs, how many minors are exposed to the adult

programming when the bleeding occurs or what effect such exposure has on minors.

As a result, based on the evidence presented the Court concludes that Playboy has established that denial of temporary injunctive relief will have a chilling effect on the adult-oriented cable television industry. Therefore, the Court concludes that the irreparable harm that Playboy will suffer if temporary injunctive relief is denied substantially outweighs any harm the Government will suffer if temporary injunctive relief is granted.

4. The Public Interest

The Court is also persuaded that Playboy has established that the public interest will not be negatively affected if temporary injunctive relief is granted and that maintaining the status quo will not harm the public interest. The contentions of the Government that the public interest will be negatively affected if relief is granted is unpersuasive.

The dilemma of how to effectively shield minors from adult programming is not novel. It has existed for at least a decade. Accordingly, several protective methods are already in place in the cable television industry to permit subscribing parents to completely block out adult programming signals they feel are inappropriate. These protective measures, which include converters and lockboxes, completely eliminate the bleeding problem and are available upon request to cable customers. At this stage of the proceedings, the Court is convinced that these devices are sufficient to provide cable customers with adequate shielding protection until the parties are able to fully litigate the constitutional issues that are beyond the scope of this preliminary proceeding. Thus, the Court concludes that even if the Government has a compelling interest in shielding minors from adult programming, given the length of time the problem has existed and the protective devices already in place, the public interest does not override the irreparable harm that will be suffered by Playboy and the adult-oriented cable television industry if temporary relief is not granted.

5. Balancing of Hardships

The balancing of hardships ensures that the imposition of an injunction preserving the status quo will not harm the Government more than Playboy. See *Opticians Assoc. of America v. Independent Opticians of America*, 920 F.2d 187, 196 (3d Cir. 1990). The Court has concluded that the potential harm to Playboy absent the issuance of a TRO is substantial. On the other hand, the Court is persuaded that the harm to the governmental interest is minimal. Maintenance of the status quo will mean that parents can continue to block programming on their own or by requesting blocking services from their local cable operator. Although some bleeding or audio breakthrough may continue to occur during the duration of the TRO, the Government could not articulate what impact and such occurrences might have on the target of the Government's announced interest [i.e., minors].¹¹ Accordingly, the Court concludes that the balance of hardships tips strongly in Playboy's favor.

III. CONCLUSION

For the reasons discussed, the Court concludes that Playboy has met its burden on the relevant factors needed to obtain temporary injunctive relief. Specifically, Playboy has shown a likelihood of success on the merits, irreparable harm if relief is denied, that the Government will not be irreparably harmed if relief is granted and that granting of relief will not adversely affect the public interest. In sum, the Court concludes that a balancing of all the relevant factors weighs in favor of granting temporary injunctive relief.

An appropriate Order will be entered.

¹¹ From the record evidence presented at this time, the Court infers that the content of the audio signal that may be heard is akin to the utterances of actress Meg Ryan during her performance in the diner scene in the movie *When Harry Met Sally*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94/96-107 JJF
Consolidated Actions

PLAYBOY ENTERTAINMENT GROUP, INC., GRAFF PAY-PER-VIEW
INC., PLAINTIFFS

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF
JUSTICE, JANET RENO, ATTORNEY GENERAL, FEDERAL
COMMUNICATIONS COMMISSION, DEFENDANTS

[Mar. 7, 1996]

TEMPORARY RESTRAINING ORDER

This 7th day of March, 1996 at 6:30 p.m., having considered
Plaintiff Playboy Entertainment Group, Inc.'s Application for a
Temporary Restraining Order,

THE COURT FINDS that:

(1) Plaintiff has demonstrated its likely to succeed on the
merits of its claim that Section 505 of the Telecommunications
Act of 1996 violates the First Amendment of the United States
Constitution;

(2) Plaintiff has demonstrated it will suffer irreparable harm
unless injunctive relief is granted;

(3) Defendants and others will suffer no harm from the
imposition of this Order; and

(4) the public interest supports this Order.

ACCORDINGLY, IT IS HEREBY ORDERED that Playboy
Entertainment Group, Inc.'s Application is **GRANTED**. The
United States of America, the United States Department of Justice,
Attorney General Janet Reno, the Federal Communications
Commission, and all their officers, agents, servants, employees,
attorneys, and anyone else acting in concert with them are hereby
enjoined from enforcing or implementing Section 505 of the
Telecommunications Act of 1996 in any manner.

Unless previously ordered by this Court, this Order shall remain
in force only until the hearing and determination by the district
court of three judges of Plaintiff's Motion for Preliminary
Injunction.

/s/ JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94-JJF

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Oct. 31, 1997

MEMORANDUM OPINION/s/ JANE R. ROTH
ROTH, Circuit Judge:

The plaintiff in this action, Playboy Entertainment Group, Inc. ("Playboy") challenges the constitutionality of Section 505 of the Communications Decency Act of 1996 ("the CDA" of "the Act"), which is Title V of the Telecommunications Act of 1996, 47 U.S.C.A. § 561 (West Supp. 1997).¹ Congress enacted Section 505 in an effort to eliminate signal bleed, i.e., the partial reception

¹ The factual and procedural background of this case is laid out in detail in this Court's opinion in *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772 (D.Del. 1996).

of sexually explicit adult cable television programming in the homes of nonsubscribers to that programming.²

On November 8, 1996, this Court denied plaintiff's request for preliminary injunctive relief to block enforcement of Section 505. *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772 (D.Del. 1996). The Supreme Court entered Judgment Orders summarily affirming this Court's judgment. *Playboy Entertainment Group, Inc. v. United States*, 117 S. Ct. 1309 (1997); *Spice Entertainment Companies, Inc. v. Reno*, 117 S. Ct. 1309 (1997).³ Following the Supreme Court's affirmance, the temporary restraining order blocking enforcement of Section 505 was lifted.

² Section 505 provides:

(a) Requirement

In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) Implementation

Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) Definition

As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

³ After the Supreme Court affirmed this Court's denial of preliminary injunctive relief, *Spice Entertainment Companies* voluntarily dismissed its claims without prejudice.

In our decision denying preliminary injunctive relief we concluded that Section 505 did not suffer from the "vice of vagueness" and that Playboy would have little likelihood of succeeding on the merits of a vagueness claim. *Playboy*, 945 F. Supp. at 791. This conclusion was based upon our determination that Playboy clearly understood that the law applied to it and that Section 505 used accepted terms, similar to language used by the Supreme Court for similar purposes, which imbued the statute with meaning. *Id.* (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

Presently before the Court are Playboy's Motion for Summary Judgment on Vagueness and defendants' Motion for Partial Summary Judgment on the Issues of Vagueness and Overbreadth. Summary judgment is appropriate "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party cannot rely solely on the allegations contained in its pleading; it must offer specific facts indicating that there is a genuine issue for trial. *Id.* at 324.

When ruling on a motion for summary judgment, the court must construe the evidence and any reasonable inferences that can be drawn therefrom in favor of the non-moving party. *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 637 (3d Cir. 1993). While the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322-23.

Following the Supreme Court's recent decision in *American Civil Liberties Union v. Reno*, — U.S. —, 117 S. Ct. 2329 (1997),

holding the Internet provisions of the CDA unconstitutional, Playboy argues that Section 505 is also unconstitutionally vague. In response, defendants state that in its decision in *Reno* the Court explicitly declined to reach the question of vagueness, but rather found the relevant provisions of the CDA were unconstitutionally overbroad. Furthermore, defendants contend that Section 505 is neither vague nor overbroad and seek partial summary judgment as to these issues.

The Supreme Court's decision in *Reno* was driven by the unprecedented breadth and scope of the prohibitions on speech that it reviewed and also by the nature of the medium that was being regulated. The Internet is an international network of interconnected computers which has been described as "a unique and wholly new medium of worldwide communication." *Reno*, — U.S. at —, 117 S. Ct. at 2334 (quoting *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996) (finding 81)). Not only did the Internet provisions of the CDA prohibit the knowing transmission of indecent material to minors,⁴ but the technology had not yet developed an effective means of safeguarding against transmission of such material to children. *Id.* at —, 117 S. Ct. at 2347. The very nature of the Internet makes it impossible to utilize an analogue to the scrambling or time channeling requirements imposed by Section 505. Consequently, the provisions at issue in *Reno* functioned as a blanket prohibition against the transmission of indecent material, whether publicly or privately, on the Internet. *Id.* at —, 117 S. Ct. at 2347-48. Such draconian measures were unnecessarily overbroad to protect children from a noninvasive medium like the Internet. *Id.* at —, 117 S. Ct. at 2336 (finding that the "'odds are slim' that a user would enter a sexually explicit site by accident").

⁴ In *Reno*, the Court focused upon two provisions of the CDA. The first prohibited the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. 47 U.S.C.A. § 223(a). The second provision prohibited the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. *Id.* § 223(d). Affirmative defenses were included for those who took good faith measures to avoid transmissions to minors or for those who restricted access to their communications by requiring age verification. See 47 U.S.C.A. §§ 223(b),(e).

In contrast, television, whether broadcast or cable, is a highly pervasive medium. *Denver Area Educational Telecommunications Consortium v. F.C.C.*, — U.S. —, —, 116 S. Ct. 2374, 2386 (1996). It is possible to encounter unwanted and offensive pictures and audio simply by changing channels. Furthermore, because television broadcasting is a highly public forum, there is no risk that Section 505 would impose undue restrictions upon purely private speech. *See Reno*, — U.S. at —, 117 S. Ct. at 2347. There is also a long history of regulation in the area of broadcasting.⁵ In the context of radio broadcasting, the Supreme Court has specifically endorsed time channeling as a constitutionally acceptable means of protecting children from pervasive, sexually explicit or indecent speech. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978) (holding that while an indecent monologue deserved first amendment protection, in the appropriate context, the FCC was authorized to restrict radio broadcasts to times when children were not likely to be in the audience). Accordingly, although the Supreme Court's decision in *Reno* is instructive as the most recent analysis by the Court of the state of its own First Amendment jurisprudence, and more specifically, of the validity of a restriction on indecent speech, we do not believe that *Reno* can be completely determinative of the issues presently before this Court.

Moreover, after hearing oral argument on the cross motions for summary judgment presently before the Court, we conclude that these motions are premature, as material questions of fact remain unresolved. We are particularly concerned about the uncertainty which continues to surround the restrictions on programming on channels primarily dedicated to sexually-oriented programming during the non-safe harbor hours, presently the hours from 6:00 a.m. to 10:00 p.m. In order to rule on the questions presented by these motions, including the initial question of whether Playboy has standing to challenge the vagueness of Section 505, we require further information, including Playboy's intentions, if any, to broadcast, outside the safe harbor hours, programming that is not

⁵ Section 505 does not, in fact, purport to regulate actual programming, rather it is aimed solely at signal bleed, a mere secondary effect of plaintiff's broadcasts. *Playboy*, 945 F. Supp. at 785.

sexually-oriented or that is materially different in sexual-explicitness to its current format. In addition, our consideration of these questions should be deferred until further information relating to the enforcement of this provision by the Federal Communications Commission (FCC) is before us.⁶ Furthermore, there remains a fundamental uncertainty surrounding the question of how a channel primarily dedicated to sexually-oriented programming during safe harbor hours would be classified if it opted to air an alternative type of programming during non-safe harbor hours.

Accordingly, it is apparent that issues remain regarding the potential vagueness and overbreadth of Section 505. Discovery is presently ongoing in this case. Because we believe that discovery may further assist us in resolving the questions pending before us, we will deny the cross motions without prejudice to their being refiled at a later time, if appropriate.

An appropriate Order will follow.

⁶ For example, at oral argument on the cross Motions, defendants' counsel were unable to advise us whether there are any FCC letter or advisory opinions that are available to assist this Court, the plaintiff, or other channels "primarily dedicated to sexually-oriented programming" in construing the scope of permissible regulation under Section 505.

26a

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94-JJF

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Oct. 31, 1997]

JUDGMENT ORDER

WHEREAS, on this day of October, 1997, upon consideration of the motion of plaintiff for summary judgment on vagueness; defendants' motion for partial summary judgment on the issues of vagueness and overbreadth; the responses of both plaintiff and defendants; and for the reasons stated in the foregoing memorandum opinion,

IT IS HEREBY ORDERED that:

1. Plaintiff's motion for partial summary judgment on vagueness is DENIED without prejudice; and

27a

2. Defendants' motion for partial summary judgment on the issues of vagueness and overbreadth is DENIED without prejudice.

/s/ JANE R. ROTH
JANE R. ROTH
United States Circuit Judge

/s/ JOSEPH J. FARNAN, JR.
JOSEPH J. FARNAN, JR.
United States Chief District Judge

/s/ JEROME B. SIMANDLE
JEROME B. SIMANDLE
United States District Judge

28a

APPENDIX E

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054

JAN 30 1998

IN REPLY REFER TO:

Playboy Entertainment Group, Inc.
c/o Robert Corn-Revere, Esq.
Hogan and Hartson, L. L. P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Dear Mr. Corn-Revere:

This is in response to your filing on behalf of Playboy Entertainment Group, Inc. requesting an expedited declaratory ruling "... to assist the network and cable operators in identifying which programming must be "fully scrambled," "fully blocked" or subjected to safe harbor obligations pursuant to Section 505 of the Telecommunications Act of 1996." You ask the Commission to review video tapes of nine programs and pass upon their status under the provisions of Section 505, 47 U.S.C. §561.

Section 505 provides that:

In providing sexually explicit programming or other programming that is indecent on any channel of its service primarily dedicated to sexually oriented programming, a multichannel video programming distributor shall fully scramble or otherwise block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

A declaratory opinion regarding nine video tapes submitted is requested in the context of this provision and to determine compliance with it. Video tapes of the following programs were included: *Doin' it Right*; *Hot, Sexy and Safe*; *360- Sex in the USA*; *World of Playboy*; *9-1/2 Weeks*; *The Unbearable Lightness of Being*; *Playboy Late Nite*; *Video Playmate Calendar*; *Rambo: First Blood Part II*.

29a

The Commission has held that in general, requests for declaratory rulings involving matters directly related to programming issues must be dealt with cautiously. Declaratory rulings involving determinations as to the contents of specific video programs have the potential to be viewed as prior restraints. See e.g., *William J. Byrnes*, 63 RR 2d 216, *app. for rev. den.*, 2 FCC Rcd 3957 (1987); *Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, 9 FCC Rcd 7638, n. 16 (1994); *vacated on other grounds sub nom. Becker v. FCC*, 95 F.3d 75 (1996); and *National Association of Independent Television Producers and Distributors v. FCC*, 516 F. 2d 526, 540 (2d Cir. 1975). For these reasons we decline to issue the requested declaratory ruling.

Sincerely,

/s/ MEREDITH J. JONES
MEREDITH J. JONES
Chief, Cable Services Bureau

JUN 4 1999

OFFICE OF THE CLERK

No. 98-1682

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS*v.***PLAYBOY ENTERTAINMENT GROUP, INC.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

1. Appellee argues (Mot. to Aff. 11-14) that the district court correctly applied strict scrutiny in this case, notwithstanding that the Court in *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), expressly stated that it need not decide whether strict scrutiny applies to regulation of indecency on cable television. See *id.* at 755. Although separate opinions by Justices Kennedy, see *id.* at 803-804, and Thomas, see *id.* at 832, in *Denver Area* did apply strict scrutiny to the provisions in that case, each of those opinions reached conclusions that differ from one another and from the principal opinion. Accordingly, the fractured opinions in *Denver Area* cannot be said to have definitively resolved the question of the standard of review applicable to indecency on cable television. See J.S. 14-15.

Moreover, regardless of the level of scrutiny applied, this Court's decision in *Pacifica* at least made clear that certain unique features of the broadcast media—their “uniquely pervasive presence,” the fact that they “confront[] the citizen * * * in the privacy of the home,” the inefficacy of “prior warnings” to “protect the listener or viewer from unexpected program content,” and their “unique[] accessibility” to children,” 438 U.S. at 748-749—significantly

affect the analysis of restrictions on indecency in broadcasting. The plurality in *Denver Area* acknowledged the effect of those factors in the First Amendment analysis of indecency on cable television, see 518 U.S. at 744-748, and Justice Kennedy's opinion also acknowledged that those "concerns are weighty and will be relevant to whether the law passes strict scrutiny." *Id.* at 804. Nonetheless, as we explain in the jurisdictional statement (at 15-17), the district court's opinion in this case gave no weight to those concerns. Plenary review is thus warranted to correct the district court's departure from the analysis employed by this Court in *Pacifica*.

Appellee argues (Mot. to Aff. 13) that "the very outcome in *Denver* reveals the fundamental flaw in the government's reasoning," because the plurality in *Denver Area* "approved cable operators' ability to transmit (or not) totally unscrambled indecent programming on leased or public access channels at any time of the day or night." The basis for that holding, however, was that means other than the mandatory segregation and blocking provision at issue in that case were available to protect minors from indecency. See 518 U.S. at 756-759. Prominently featured among those alternative means was Section 505. See *id.* at 756. The Court's holding in *Denver Area*, therefore, rested on at least the possibility that Section 505 is constitutional; it could not establish, as appellee urges, that Section 505 violates the First Amendment.

2. Appellee argues (Mot. to Aff. 17) that, "[w]hether or not some of *Pacifica*'s reasoning may apply to cable television as suggested by the *Denver* plurality, the time channeling requirement of Section 505 is far more restrictive of speech when applied to cable television networks than it is in the broadcasting context."¹ Appellee bases that assertion on

¹ Appellee states that our claim that "the government's interest is stronger here than in the broadcasting context because *Pacifica* involved

the fact that "[w]ith respect to broadcasters, the safe harbor rules may require a station to reschedule a particular program to late night hours," while "the court below found that the * * * networks [affected by Section 505] had 'no practical choice' but to go dark for 16 hours per day." *Ibid.*

Initially, Section 505 would not result in the banning of appellee's networks 16 hours a day on all cable systems. As the district court made clear, an increasing number of cable operators use digital technology that easily eliminates signal bleed. See J.S. App. 6a-7a, 9a. Those operators may broadcast appellee's cable networks at whatever time of day or night they wish with no threat of signal bleed, and Section 505 is therefore not at all restrictive of speech with respect to their subscribers. See J.S. 17 n.5.

In any event, appellee's claim that Section 505 is more restrictive of speech because it would impose a greater decrease in programming than did the FCC rule at issue in *Pacifica* is without merit. The FCC rule upheld in *Pacifica* required time-channeling only of indecent material. If a radio station emulated appellee by broadcasting "virtually 100% sexually explicit adult programming," J.S. App. 6a, the FCC's rule would require it to limit its broadcasts to the 10 p.m.-to-6 a.m. safe harbor. In the same way, Section 505 requires time-channeling or blocking only of indecent material; cable operators may broadcast other material that appellee

the one-time broadcast of inappropriate language compared to channels that carry virtually 100% sexually explicit adult programming is not correct, nor is it supported by the record below." Mot. to Aff. 12 (quoting J.S. 17) (internal quotation marks and citation omitted). The district court repeatedly stated that "[t]he programming on the Playboy network is virtually 100% sexually explicit adult programming." J.S. App. 5a-6a; see also *id.* at 42a, 47a. Indeed, the court distinguished appellee's broadcasting from that of other channels, which broadcast material "which contained some sexually explicit scenes but were not continuously sexually explicit." *Id.* at 6a. A child may therefore easily find sexually explicit material by tuning in to signal bleed from appellee's channels.

might choose to make available on its network at any time of the day or night, without scrambling. See Order and Notice of Proposed Rulemaking, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C.R. 5386, 5387, at ¶ 6 (1996). The fact that (for cable operators that do not already employ digital or other complete scrambling technology) time-channeling would limit appellee's programming for "16 hours per day" is the result of appellee's choice to broadcast only indecent material. That choice suggests that appellee's programming poses a particular threat to children; it does not suggest that Section 505 is "more restrictive of speech" than the rule at issue in *Pacifica*.²

3. Appellee argues (Mot. to Aff. 19) that Section 505 is unconstitutional because the government "did not show that the recited concerns are real, not conjectural." The district court, however, did not hold Section 505 unconstitutional because it does not address a real problem. To the contrary, the court ultimately found that "there is sufficient risk of harm to susceptible minors to warrant protection from sexu-

² Appellee errs in stating that "[t]here is no dispute that Section 505 prevents the transmission of Appellee's programming during 'the hours when most viewers want to see such programming.'" Mot. to Aff. 15 (quoting J.S. 18 n.6); see also *id.* at 3, 27. The district court found that "30-50% of all adult programming is viewed by households prior to 10 p.m." J.S. App. 33a. It follows that 50-70% of such programming is viewed after 10 p.m. and would not therefore be affected by Section 505. The safe harbor provision of Section 505 *permits* the transmission of appellee's programming when most viewers want to see it, and it imposes only a minor restriction on the minority who want to view it at a different time. The cited portion of the jurisdictional statement makes that point. See J.S. 18 n.6 ("We do not dispute that time-channeling of indecent sexually explicit television programming to the hours when most viewers want to see such programming is a restriction on such programming."). Indeed, the fact that the safe-harbor hours are precisely the hours when adults usually want to view sexually explicit programming, coupled with the easy availability of VCR machines to tape such programming and play it at a time convenient to the viewer, emphasizes the relatively modest scope of the restriction imposed by Section 505.

ally explicit signal bleed." J.S. App. 30a. The sole basis for the district court's holding that Section 505 is unconstitutional was that, in the court's view, a less restrictive alternative is possible. The district court's finding that signal bleed is a real problem is well supported by the record,³ and appellee's disagreement with the district court's conclusion on that point could not provide a basis for summary affirmance.

Appellee notes that the district court stated that "the Government has not convinced us that [signal bleed] is a pervasive problem." Mot. to Aff. 20 (quoting J.S. App. 36a). The very next sentence in the court's opinion, however, is that "[p]arents may have little concern that the adult channels be blocked." J.S. App. 36a. Read together, the two sentences make clear that the court believed that the government had not shown that parents (who are likely not to know of the problem) generally perceived that there is a substantial threat that their children would be exposed to signal bleed or that they should take affirmative steps to block it; the district court was not contradicting its earlier findings that audio signal bleed is common and video signal bleed is an ever-present danger on the majority of cable systems in operation today. Proof that the broadcast of indecent material occurred during a time of day when children were likely to be in the audience was sufficient in *Pacifica* to justify the FCC's time-channeling rule. Appellee's argument that the government had to establish not the number of

³ The district court found that most cable operators use a technology that leaves the audio portion of appellee's sexually explicit programming entirely audible and leaves portions of the video programming intelligible to varying degrees. J.S. App. 7a-8a. Indeed, the district court's finding that "the vast majority (in one survey, 69%) of cable operators have, in response to § 505, moved to time channeling," *id.* at 16a-17a, makes clear that the cable industry itself believes that signal bleed occurs with some regularity; otherwise, those systems would not have chosen to undergo the loss of revenue that results from limiting sexually explicit channels to the safe-harbor hours.

children potentially exposed to signal bleed from sexually explicit channels, but the number who actually listen to or watch such material, is inconsistent with *Pacifica*.

4. Appellee argues (Mot. to Aff. 22) that the government did not "demonstrate that imposing the 'safe harbor' under Section 505 'will in fact alleviate [the] harms [of signal bleed] in a direct and material way.'" In appellee's view, such proof is required by this Court's decision in *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

Initially, appellee's contention rests on the mistaken premise that federal regulation to protect children from indecency is permissible only on the same kind of empirical showing of harm as federal regulation of the speech of cable operators in *Turner* to promote the entirely different purpose of protecting a particular competitive structure in the broadcasting industry. But it has long been settled that there is a "compelling interest in protecting * * * minors' which extend[s] to shielding them from indecent messages." *Reno v. ACLU*, 521 U.S. 844, 869 (1997). See J.S. 20 n.7. That interest is supported by deeply felt beliefs in our society about how children should be raised, as well as by the empirical, scientific evidence that led the district court to conclude that the risk to minors is real. See J.S. App. 30a.

Moreover, appellee apparently would demand direct, empirical evidence that children suffer harm from hearing the audio portions of appellee's sexually explicit programming in their entirety and viewing the partly (and at times completely) visible video portion. Children, however, are not experimental subjects whose environment can be manipulated with no regard for moral and social consequences. As the district court noted, acquiring evidence of the sort appellee demands would raise the "clear ethical questions surrounding clinical research of the effects of children viewing sexually explicit programming." J.S. App. 29a.

5. Contrary to appellee's suggestion (Mot. to Aff. 23-26), we do not argue that the district court erred in considering,

as part of the constitutional analysis, the possibility that other forms of regulation would be less speech-restrictive, even if those other forms of regulation have not been enacted into law. But even when strict scrutiny is applied, a party claiming that a particular regulation violates the First Amendment must do something more than dream up a theoretically possible alternative regulatory scheme; the alternative scheme must realistically promise to advance the legitimate purposes underlying the regulation, and it must be genuinely less restrictive of speech. The alternative on which the district court relied would do neither. See J.S. 17-25.

First, the district court's hypothetical Section 504, enhanced by complex requirements to ensure notice and easy and inexpensive access to lockboxes by parents who want them, would not be an alternative to Section 505, because it would not serve one of the purposes animating Section 505—society's interest in "protect[ing] children from exposure to patently offensive sex-related material." J.S. App. 26a. Appellee asserts (Mot. to Aff. 28) that the Court "addressed the identical question" in *Denver Area*.

Denver Area in fact suggests the inadequacy of appellee's argument. The Court noted that, among the remedies to the problem of "children with inattentive parents" is to take measures that may "impos[e] cost burdens upon system operators (who may spread them through subscription fees)," and, of particular significance, to "require[] lockbox defaults to be set to block certain channels (say, sex-dedicated channels)." 518 U.S. at 758-759. Although lockboxes (i.e., set-top converters with channel lockout features, see J.S. App. 58a) offer no safeguard to children in households with cable-ready televisions that are not connected to set-top converters, see *ibid.*, the lockbox approach mentioned in *Denver Area* does operate like Section 505—rather than Section 504—in one important respect. Like Section 505, such a lockbox approach does not depend on parental awareness and initiative to offer children at least some level of protection.

By contrast, even the enhanced-notice version of Section 504 relied upon by the district court would have precisely the reverse effect; children would be exposed to sexually explicit material unless the parent took affirmative steps to avoid such exposure. None of the opinions in *Denver Area* stated that such an alternative would adequately protect children.

In any event, appellee does not dispute that the district court's conclusion that an enhanced-notice version of Section 504 would be an adequate alternative to Section 505 overlooked the independent societal interest in protecting children from sexually explicit materials. None of the opinions in *Denver Area* discussed whether that interest is sufficient to justify the kind of modest restriction on speech that Section 505 imposes.⁴ Plenary review is warranted so that this Court may give full consideration to a key rationale underlying Congress's action.

Second, the district court's hypothetical, enhanced Section 504 would likely result in at least as great a restriction of appellee's programming as results from Section 505. The district court itself found that Section 504, without the district court's enhanced-notice provisions and in part without the provision for free access to blocking devices, see J.S. App. 20a & n.19, had led to approximately one-half of 1% of households requesting blocking. The enhanced-notice and other provisions the district court envisioned would surely result in at least a modest increase in the number of households requesting blocking devices. Even a modest increase would, according to the district court's findings, create at least the same incentives for cable operators to time-channel (or completely drop) appellee's network that Section 505 creates. The net result would be a regime in which the

⁴ Cf. 518 U.S. at 806 (opinion of Kennedy, J.) ("Congress does have * * * a compelling interest in protecting children from indecent speech. So long as society gives proper respect to parental choices, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors.") (citations omitted).

restrictions on speech are at least as great as under Section 505.

The district court noted the testimony that the cost of distributing lockboxes to 3% of a cable system's customers would equal all of the revenue the operator derived from its sexually explicit channels. J.S. App. 21a-22a. The court added that, if a cable operator were willing to amortize the cost of the lockboxes over five years, the number of lockboxes that could be distributed would rise to 6% of the subscriber base. *Id.* at 22a. In actuality, cable operators could be expected to drop (or time-channel) sexually explicit channels long before the number of subscribers who requested lockboxes reached the 3-6% range. As the district court found, "[e]conomic theory would suggest that profit-maximizing cable operators would cease carriage of adult channels" before exhausting *all* revenues from such channels; rather, they would take action when the "costs rose to such a point that the profit from adult channels was less than the profit from channels unlikely to require blocking." *Ibid.* Therefore, a relatively minor boost in the number of subscribers seeking lockboxes—a boost that would be unavoidable under a version of Section 504 that mandated effective notice and easy availability of lockboxes—would be sufficient to lead to the same kinds of time-channeling under Section 504 as the district court found would occur under Section 505. Indeed, an enhanced Section 504 would likely result in more restrictions on speech, since at least some parents, given effective notice of the problem, may well seek lockboxes even if cable operators choose to time-channel their programming; to avoid the costs of supplying those lockboxes, cable operators might simply drop appellee's programming altogether. An enhanced Section 504 thus would not be less restrictive of speech than Section 505.

6. The district court's dismissal of our post-trial motions puts the government in an untenable position. See J.S. 25-29. The district court's opinion stated that it would

"require" appellee to take certain actions, J.S. App. 38a, but its injunction omitted any such requirement. Under the district court's ruling, however, we could obtain a resolution of the contradiction between the district court's opinion and its injunction only by delaying filing a notice of appeal until the district court acted on our post-trial motions, thereby risking that our notice of appeal would be deemed to have been jurisdictionally out of time.

Appellee argues that "[o]nly a handful of cases," Mot. to Aff. 30 n.31, may be affected by the legal issue presented. Those cases, however, frequently involve serious constitutional issues in which it is particularly important that orderly processes of litigation be available to the court and the parties, so that premature or unnecessary resolution of constitutional questions may be avoided and issues may be presented to this Court in a manner most suitable for this Court's resolution. Plenary review of the district court's jurisdictional ruling is warranted, so that parties in cases in which a direct appeal to this Court is available may both protect their rights to appeal and obtain postjudgment relief from the district court that could alter or clarify the issues on appeal in this Court—or even eliminate the need to take an appeal at all.

* * * * *

For the foregoing reasons and those stated in the jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communications
Commission

JUNE 1999

AUG 24 1999

OFFICE OF THE CLERK

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v.

PLAYBOY ENTERTAINMENT GROUP, INC.

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BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, Tit. V, 110 Stat. 136, requires that a cable television operator "providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming" either "fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber * * * does not receive it," or, alternatively, not provide that programming "during the hours of the day (as determined by the [Federal Communication] Commission) when a significant number of children are likely to view it."

The questions presented are:

1. Whether Section 505 violates the First Amendment.
2. Whether the three-judge district court was divested of jurisdiction to dispose of the government's post-judgment motions under Rules 59 and 60 of the Federal Rules of Civil Procedure by the government's filing of a notice of appeal while those motions were pending.

II

PARTIES TO THE PROCEEDINGS

Appellants are the United States of America, Janet Reno, Attorney General, the United States Department of Justice, and the Federal Communications Commission. Appellee is Playboy Entertainment Group, Inc. Spice Entertainment Companies, Inc. (formerly Graff Pay-Per-View), was a party below but, after failing to obtain a preliminary injunction, chose not to participate in litigation of the merits. Spice has since been purchased by Playboy.

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In the Supreme Court of the United States

No. 98-1682

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

PLAYBOY ENTERTAINMENT GROUP, INC.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE*

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-39a) is reported at 30 F. Supp. 2d 702. The permanent injunction (J.S. App. 87a-88a) and the order denying the government's post-trial motions (J.S. App. 91a-92a) are unreported. The prior opinion of the district court denying a preliminary injunction (J.S. App. 40a-86a) is reported at 945 F. Supp. 772. The order of this Court affirming the denial of the preliminary injunction is reported at 520 U.S. 1141. The opinion of the district court granting a temporary restraining order (Mot. to Aff. App. 1a-17a) is reported at 918 F. Supp. 813.

JURISDICTION

The permanent injunction of the three-judge district court, dated December 29, 1998, was entered on December 30, 1998. The government filed a notice of appeal on January 19, 1999 (a Tuesday after a Monday holiday). On March 10,

1999, Justice Souter extended the time for filing a jurisdictional statement to and including April 19, 1999. On March 18, 1999, the district court entered an order dismissing the government's motions to alter or amend the judgment and to correct the judgment. On April 7, 1999, the government filed a second notice of appeal, from both the original injunction and the order dismissing the government's post-trial motions. This Court noted probable jurisdiction on June 21, 1999. The jurisdiction of this Court rests on Section 561(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 143, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." Sections 504, 505 and 561 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, 142, are reproduced at J.S. App. 96a-101a.

STATEMENT

This action arises out of Congress's efforts to address the problem of "signal bleed" of cable television channels that are devoted to sexually explicit, "adult" programming. Such signal bleed occurs when cable operators partially scramble or otherwise block the signal on sexually explicit channels, in an effort to deprive those who do not pay for such channels of a clear signal. Because the scrambling is only partial, however, intelligible video and audio signals remain, and are transmitted to all households on the cable system. As a result, children in all households on a given cable system—even those households that do not subscribe to appellee's programming services—may be able to view and hear the sexually explicit content on appellee's programming that is distributed by cable operators.

1. Approximately 62 million households nationwide receive cable television. J.S. App. 53a. Cable customers typically are offered a "basic" package of channels for a monthly fee, but they also may subscribe at an additional monthly fee to premium channels that provide sports programming, recently released movies, or adult, sexually explicit entertainment. *Id.* at 5a. Cable customers may also order premium programming on a pay-per-view basis, permitting the customer access to a particular movie, sporting event, or sexually explicit program for a specified additional fee. *Ibid.*

In an effort to provide that cable customers who have not paid for premium programming are not able to view it, most cable operators scramble the programming at their central transmission facility, using either "RF" or "baseband" technology. RF scrambling causes the picture to jump and roll on the television sets of customers who are not authorized to receive the premium channel, although the images on the screen can be discerned to varying degrees at varying times. The cable system provides customers who are authorized to receive premium channels with a set-top device, called a "converter," which is connected between the subscriber line and the television set to counteract the scrambling and permit clear reception of one or more premium channels. RF scrambling does not affect the audio portion of the signal, and, as a result, the scrambling does not prevent the audio portion from being heard clearly on all customers' television sets at all times. J.S. App. 7a.

Modern baseband scrambling, in contrast, renders the video portion of the signal unintelligible. As with RF scrambling, subscribers authorized to receive premium programming are given converters to permit clear reception. Some baseband scrambling systems also encrypt the audio portion of the signal, so that no intelligible audio is presented to customers who do not subscribe to the scrambled premium service. For the most part, however, cable operators use RF

scrambling or prior generations of baseband scrambling, which do not render the video completely unintelligible and do not scramble the audio at all. J.S. App. 7a-8a.

The limitations of these scrambling systems give rise to "signal bleed." In any system that carries premium programming, all customers of the system receive the scrambled signal on all televisions that are connected to the cable system. As a result, the cables in those systems that carry premium programming but do not conform to the scrambling and blocking requirements of Section 505 typically carry a partially scrambled video signal and a completely clear audio signal of the premium programming, including, when offered, sexually explicit programming. J.S. App. 9a.

2. Congress enacted the statutory provision at issue in this case, Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, to address the problem of signal bleed in the context of cable channels that are devoted to sexually explicit, "adult" programming. Congress was "aware that some cable systems [were] permitting 'adult' programs that [were] clearly unsuitable for children to be received in the home without sufficient scrambling." S. Rep. No. 367, 103d Cong., 2d Sess. 103 (1994). Senator Feinstein, one of the sponsors of Section 505, explained that "[p]arents * * * come home after work only to find their children * * * watching or listening to the adults-only channel, a channel that many parents did not even know existed." 141 Cong. Rec. S8167 (daily ed. June 12, 1995). As an example, she referred to the fact that a "partially scrambled pornography signal was broadcast only one channel away from a network broadcasting cartoons and was easily accessible for children to view." *Ibid.*

The record in this case reflects the very graphic audio and visual content of the sexually explicit programming services the availability of which to children was the subject of congressional concern. We have lodged with the Court copies

of three tapes, DXs 1, 2 and 44, that are in the record in this case¹ and that demonstrate the extent to which reasonably discernible images and sounds can be seen and heard on sexually explicit cable programming services operated by appellee and others, despite the scrambling that cable operators ordinarily undertake. In addition, we have lodged two other videotapes in the record, DXs 11 and 35, that show unscrambled programming on Playboy and Spice. These tapes were among those provided by appellee and Spice in response to a government request for copies of their programming on randomly selected dates.² Finally, some of the content of the programming on Playboy, Spice, and similar sexually explicit cable programming services is described at pages 5-10 of Defendants' Post-Trial Brief, which was filed in

¹ At the trial in this case, the court reserved ruling on admissibility of evidence until after trial. Tr. 811-812. The parties then submitted letters to the court, dated March 25, 1998, attaching their respective lists of exhibits. The letters were docketed by the district court on April 17, 1998. Docket Entries 243, 244. The letters set forth the parties' agreement that the parties' exhibits may be admitted into evidence subject to objections as to relevancy, to be asserted, if at all, in connection with the parties' reply briefs, as Judge Farnan had indicated at the pretrial conference. No such objections were made in the parties' reply briefs in the district court.

² A useful summary of the nature of the programming at issue in this case was provided by the marketing vice-president of Spice, which operates several sexually explicit programming services similar to those operated by appellee Playboy. He testified (Nolfi Dep. 35) regarding a document that provides the "content guidelines" used for the Spice and Spice Hot networks. According to the document (DX Vol. 1, No. 73), the Spice network depicts such activities as "female masturbation/external," "girl/girl sex," "oral sex/cunnilingus," "explicit language," "wide shot penis/flaccid," and "wide shot vagina." *Id.* at TWC00132. According to the same document, programming on the even more explicit Spice Hot network depicts "female masturbation with penetration," "male masturbation," "medium shot penis/erect," "oral sex/fellatio," "vaginal penetration/objects," "vaginal penetration/penis," and "vaginal penetration/tongue." *Ibid.*

the district court; we have lodged copies of those pages from our post-trial brief with the Clerk of this Court. We have not reproduced descriptions of the programming and the language used in the programming in this brief, but we urge the Court to examine those lodgings, so that the Court may be familiar with the programming at issue in this case and with the problem of signal bleed.

Congress's concerns about such programming were triggered by complaints from across the country. For example, Mr. Anthony Snesko of Poway, California, had made 550 copies of a videotape showing the Spice Channel as it appeared on his television at 9 a.m. sometime in April or May, 1994, and had distributed a copy to every Member of the Senate and House of Representatives. DXs 1, 47.³ In December 1995, a mother from Cape Coral, Florida, complained to her Representative that she had recently found her eight-year-old son, seven-year-old daughter, and a playmate watching Spice at 4 p.m., "transfixed" by scenes of "a naked man sodomizing a woman" and the "groans and epithets that go along." DX 55.⁴ In 1993, Senator Biden urged the Federal Communications Commission to review a cable com-

³ The videotape shows a scene in which a man performs oral sex on a woman. The video images, while scrambled, are discernible. The entirely audible audio portion contains four-letter words and vulgar references to sexual organs. DX 1.

⁴ The record contains other evidence of partially scrambled transmissions by Playboy and Spice. For example, Defendants' Exhibit 4 contains partially scrambled scenes videotaped from the Playboy Channel in Orange, California. Harris Decl., DX Vol. 1, No. 49, at para. 5. The scenes depict "images of a nude woman caressing herself and then of two nude women in the water and in a boat, caressing each other." J.S. App. 52a. Defendants' Exhibit 5 is an audiotape of the Spice Channel in early 1994 in the Oxnard, California home of a non-Spice subscriber. Allen Decl., DX Vol. 1, No. 48, at para. 5. The tape contains "the sounds of what appear to be repeated sexual encounters accompanied by assorted orgasmic moans and groans." J.S. App. 52a-53a.

pany's compliance with federal law after large numbers of Delaware residents voiced objections about unwanted reception of Spice. DX 72. See also DXs 59, 61, 70 (constituent letters complaining about inadequately scrambled "sex channels" and their availability to children).

In her floor statement, Senator Feinstein acknowledged that an alternative approach would be for cable operators to provide complete blocking of audio and video signals free of charge at the request of a subscriber. 141 Cong. Rec. S8167 (daily ed. June 12, 1995) (statement of Sen. Feinstein).⁵ But Senator Feinstein urged that a provision for blocking on demand would not "go[] far enough," because it would "put the burden of action on the subscriber * * * by requiring a subscriber to specifically request the blocking of indecent programming." *Ibid.*

3. Section 505 became law on February 8, 1996, when the President signed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Under Section 505, "[i]n providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor"—a term that includes a cable operator—"shall fully scramble or otherwise

⁵ Senator Feinstein noted that the cable industry association had adopted voluntary guidelines that called for cable operators to provide for free blocking upon request. 141 Cong. Rec. at S8167. At the time Senator Feinstein and Senator Lott proposed the provision ultimately enacted as Section 505, the Senate bill, as reported by the Committee on Commerce, Science and Transportation, already contained a requirement for blocking upon request of programming unsuitable for children. See S. 652, 104th Cong., 1st Sess. § 640 (1995), *reprinted in* S. Rep. No. 23, 104th Cong., 1st Sess. 122 (1995). That requirement was revised by the Conference Committee to apply to all programming, not merely programming unsuitable for children, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 192 (1996), and it was enacted in that form as Section 504 of the Telecommunications Act of 1996, 110 Stat. 136.

fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." 110 Stat. 136 (47 U.S.C. 561(a) (Supp. III 1997)). Until the cable operator complies with these requirements, it "shall limit the access of children" to such programming "by not providing such programming during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it." 110 Stat. 136 (47 U.S.C. 561(b) (Supp. III 1997)).

On March 5, 1996, the Federal Communications Commission issued an interim rule for implementation of Section 505. Order and Notice of Proposed Rulemaking, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C.R. 5386 (*Implementation of Section 505*). First, the Commission interpreted the term "sexually explicit adult programming," as used in Section 505, to be a category of "programming that is indecent," a phrase also used in the statute. *Implementation of Section 505*, paras. 6, 9. The Commission defined "indecent programming" on an interim basis to mean "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium," and proposed to adopt that definition on a permanent basis. *Id.* para. 9. As the Commission explained, that is essentially the same definition adopted by the Commission for purposes of regulating indecent broadcast programs. *Id.* paras. 6, 9.

The Commission also proposed, and provisionally adopted, a safe harbor, for purposes of Section 505's time-channeling alternative, of 10:00 p.m. to 6:00 a.m.. The Commission noted that those were the same safe-harbor hours that it had previously established, based on an extensive administrative record, in its rule governing indecent over-the-air broadcast television or radio programs, which had been sustained by

the District of Columbia Circuit, sitting en banc, in *Action for Children's Television v. FCC*, 58 F.3d 654 (1995), cert. denied, 516 U.S. 1043 (1996). *Implementation of Section 505*, paras. 5, 8; see 47 C.F.R. 73.3999. The rules implementing Section 505 became effective on May 18, 1997. *Implementation of Section 505 of the Telecommunications Act of 1996*, 12 F.C.C.R. 5212 (Apr. 17, 1997).

4. Appellee Playboy Entertainment Group provides "virtually 100% sexually explicit adult programming," J.S. App. 6a, for transmission by cable operators to premium subscribers who choose to order Playboy's programming. Playboy provides such programming via its Playboy Television and AdulTVision networks. *Id.* at 5a. On February 26, 1996, Playboy filed suit in the United States District Court for the District of Delaware seeking declaratory and injunctive relief against the operation of Section 505. The complaint alleged that Section 505 violates Playboy's rights under the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The district court consolidated the action with a similar action brought by Spice Entertainment Companies (formerly known as Graff Pay-Per-View), which operated channels similar to those operated by Playboy.⁶ A three-judge court was convened pursuant to Section 561 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 142 (47 U.S.C. 223 note (Supp. III 1997)).

On November 8, 1996, the three-judge court issued a decision denying Playboy's motion for a preliminary injunction, stating that Playboy and Spice "ha[d] not persuaded us that

⁶ Playboy has recently purchased Spice, which did not participate in the proceedings after this Court affirmed the denial of a preliminary injunction, and it is no longer a party to this case. Chicago Tribune, Mar. 16, 1999, available in 1999 WL 2853823.

they are likely to prevail on the merits." J.S. App. 63a.⁷ Reviewing Section 505 under "strict scrutiny or something very close to strict scrutiny" as a content-based restriction on speech, *id.* at 67a, the court held that Section 505 is carefully tailored to further the compelling interest in protecting children. The court explained that Section 505 "does not seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing erotic material on premium cable networks if they so desire." *Id.* at 78a. Instead, the court explained, Section 505 permits cable operators to provide sexually explicit programming to willing subscribers if the operators avail themselves of either of two alternative approaches to protecting nonsubscribers—full scrambling of audio and video, or time-channeling. *Id.* at 76a.

5. Playboy appealed the denial of its request for a preliminary injunction directly to this Court, which summarily affirmed. 520 U.S. 1141 (1997).

6. The case was tried before the district court on March 4-6, 1998. On December 28, 1998, the district court issued a decision holding that Section 505 is unconstitutional under the First Amendment.

The court held, as it had at the preliminary injunction stage, that "either strict scrutiny or something very close to strict scrutiny" should be applied. J.S. App. 23a. The court also held that Section 505 is constitutional only if the government proves that it "is a 'least restrictive alternative,' i.e., that no less restrictive measures are available to achieve the same ends the government seeks to achieve." *Id.* at 26a.

⁷ Judge Farnan had entered a temporary restraining order on March 7, 1996, at the outset of the case, which remained in effect until this Court summarily affirmed the district court's denial of the motion for a preliminary injunction. *Playboy Entertainment Group, Inc. v. United States*, 918 F. Supp. 813 (D. Del. 1996) (reprinted in Mot. to Aff. App. 1a-17a); see J.S. App. 2a, 19a.

The court noted that the government asserted three compelling interests supporting Section 505: "the Government's interest in the well-being of the nation's youth—the need to protect children from exposure to patently offensive sex-related material"; "the Government's interest in supporting parental claims of authority in their own household—the need to protect parents' right to inculcate morals and beliefs [i]n their children"; and "the Government's interest in ensuring the individual's right to be left alone in the privacy of his or her home—the need to protect households from unwanted communications." J.S. App. 26a-27a. Although it expressed some doubt about the strength of the empirical evidence in the record regarding harm to minors, see *id.* at 30a, the court held that all three of those interests are present and, in sum, are compelling. *Id.* at 32a.

The court held, however, that Section 505 is not the least restrictive alternative that the government could have adopted to advance those interests. J.S. App. 35a. The court found that, under Section 505, cable operators "with incomplete scrambling technology" that could not completely eliminate signal bleed "chose time channeling because no other system-wide blocking technique is economically feasible." *Id.* at 33a n.23; see also *id.* at 16a-17a. The court found that such time-channeling restricts "a significant amount of speech," because "30-50% of all adult programming is viewed by households prior to 10 p.m.," before the safe-harbor period. *Id.* at 33a. In the court's view, Section 504, by contrast, is a content-neutral provision that permits subscribers voluntarily to request a free blocking device, thus avoiding the need for full scrambling or time channeling. *Id.* at 34a-35a.

The court acknowledged that an alternative must be not only less restrictive but also "a viable alternative." J.S. App. 35a. In this respect, the court noted that "parents usually become aware of the problem only after the child has been exposed to signal bleed, and then the damage has been

done," and that even if parents are aware of the problem, "the success of § 504 depends on parental awareness that they have the right to receive a lockbox free of charge." *Ibid.* The court was unable to find that the experience during the 14-month period in which Section 504 was in effect but Section 505 was enjoined was sufficient to alleviate the court's concerns regarding the adequacy of notice to customers under Section 504.⁸ Specifically, notwithstanding the applicability of Section 504 during that time, cable operators still had distributed blocking devices on request to fewer than one-half of one percent of subscribers. The court stated, however, that the "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." *Id.* at 36a. In the court's view, then, either there has not been "adequate notice to subscribers," or "[p]arents may have little concern that the adult channels be blocked." *Ibid.*

To address the concern that inadequate notice rendered Section 504 insufficient to protect the interests involved, the court set forth what would constitute "adequate notice" under Section 504 in the future. First, the court explained, it should include a basic notice to subscribers that children may be viewing signal bleed from sexually explicit programming and that blocking devices are readily available free of charge. J.S. App. 36a-37a. Next, the court stated that such notice would have to be provided by "[a]ppropriate means," including "inserts in monthly billing statements," "on-air advertisement on channels other than the one broadcasting the sexually explicit programming," and "a special notice" when

⁸ That period began on March 9, 1996, when the Telecommunications Act went into effect, and ended on May 18, 1997, when Section 505 was implemented after the denial of a preliminary injunction was affirmed by this Court and the temporary restraining order was finally lifted. J.S. App. 19a; see note 7, *supra*.

a cable operator "change[s] the channel on which it broadcasts sexually explicit programming." *Id.* at 37a. The cable operator would have to provide the means whereby "a request for a free device to block the offending channel can be made by a telephone call" to the cable operator. *Ibid.* Finally, the notice should be given "on a regular basis, at reasonable intervals," and whenever a cable operator "change[s] the channel on which it broadcasts sexually explicit programming." *Ibid.*

Against this background, the court held that, as enhanced with what it deemed to be "adequate notice," Section 504 would be "a less restrictive alternative to § 505." J.S. App. 38a. Because neither party had proposed an enhanced Section 504 as an alternative to Section 505, neither party had addressed whether and to what extent such an enhanced Section 504 would serve the interests underlying Section 505 or would restrict speech less than Section 505. Nonetheless, the district court found that, "with adequate notice of the issue of signal bleed, parents can decide for themselves whether it is a problem," and "to any parent for whom signal bleed is a concern, § 504, along with 'adequate notice,' is an effective solution." *Id.* at 37a-38a. The court did not address how cable operators would respond to the enhancements it proposed for Section 504, or whether and how expenses incurred as a result of those enhancements would lead cable operators to restrict appellee's programming.

The district court recognized that it could not require all cable operators that transmit sexually explicit programming services to provide the type of "adequate notice" that the court had hypothesized, because as non-parties the operators were not subject to the court's jurisdiction. But the court pointed out that it did have jurisdiction over Playboy, and declared that it would require Playboy to include notice provisions in its contractual arrangements with cable operators. The district court then reiterated that unless adequate no-

tice is provided, Section 504 would not be an effective alternative to Section 505. J.S. App. 38a.

7. On December 29, 1998, the day after announcing its decision, the court issued an order permanently enjoining enforcement of Section 505. J.S. App. 87a-88a. The order did not contain any requirement that Playboy include "adequate notice" provisions in its contracts with cable operators. Nor did it limit the scope of the injunction to Playboy, which is the only programmer of sexually explicit broadcasting that remains a party to this lawsuit.

On January 12, 1999, the government filed a motion under Rule 59(e) of the Federal Rules of Civil Procedure seeking to alter or amend the judgment to limit the injunction to Playboy, and it filed a motion under Rule 60(a) seeking to correct the judgment by including the requirement discussed in the court's opinion—that Playboy ensure that its contracts require cable operators to provide "adequate notice" to cable customers. The government then filed a notice of direct appeal to this Court on January 19, 1999, 20 days after entry of the injunction, as provided in Section 561(b) of the Telecommunications Act of 1996 (110 Stat. 143). J.S. App. 89a-90a.

On March 18, 1999, the district court dismissed the government's two motions, stating that it "lack[ed] jurisdiction to adjudicate these motions due to subsequent filing of Defendants' notice of appeal to the United States Supreme Court." J.S. App. 91a-92a. On April 7, 1999, the government filed a second notice of appeal, addressed to both the original injunction and the March 18 order. *Id.* at 93a-95a. This Court noted probable jurisdiction on June 21, 1999.

SUMMARY OF ARGUMENT

This case involves the constitutionality of a law enacted by Congress to limit the ability of minors to obtain access to highly graphic, sexually explicit programming that intrudes, uninvited, into American homes through the signal bleed of

sexually explicit programming channels on cable television. It cannot be reasonably doubted that the interests served by the law—the protection of minors and of the privacy of the home—are compelling ones. Nor can it reasonably be doubted that in enacting Section 505, Congress carefully directed its aim at the programming by-product that creates the evil, leaving it entirely open to cable operators to broadcast sexually explicit materials to their subscribers at any time (so long as minors are not threatened by signal bleed of those materials) or during hours when children are unlikely to be in the audience (if signal bleed at other times would be unavoidable). Nonetheless, the district court held that Section 505 is unconstitutional, because the court believed that it could hypothesize an entirely untried version of another statute—a version not proposed or addressed as an alternative by any party to this case—that would in its view be less restrictive. The district court's conclusions are insupportable.

I. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and a line of cases that have followed it, this Court has consistently recognized that, in undertaking First Amendment review of indecency on television and radio, a court must be cognizant of the uniquely pervasive and intrusive presence of those media in American homes and the unique accessibility of those media to children. Unlike in other First Amendment contexts, the cost of unduly limiting Congress's ability to act in this area is to disable society from serving critical interests in the protection of children and privacy; it would leave children exposed to graphic, sexually explicit audio and visual programming that our society has long viewed as entirely inappropriate for them. Accordingly, a court should be particularly careful in this context to accord deference to Congress's reasonable, predictive judgments that a particular, carefully tailored measure—such as Section 505—is the least restrictive alternative that would

achieve its ends. The district court entirely failed to accord such deference, and its judgment should be reversed for that reason.

In any event, even under the exceptionally stringent standard of review employed by the district court, Section 505 is constitutional. The district court based its decision entirely on the prediction that its hypothetical, enhanced version of Section 504 would prove to be a less restrictive alternative to Section 505. The enhanced Section 504, however, would neither be an effective alternative nor would it be less restrictive than Section 505. That is particularly true with respect to the application of Section 505 to the increasing number of cable systems that have the digital or other capacity to provide complete blocking; applying Section 505 to them is constitutional because it imposes no burden at all on speech. But it is also true with respect to the application of Section 505 to the larger number of cable systems without digital or other means to accomplish easy and inexpensive blocking.

The enhanced Section 504 would not be an effective alternative because it would not serve the compelling interests underlying Section 505. As the district court recognized, those interests include, *inter alia*, society's interest in protecting children from sexually explicit materials, separate and apart from its interest in helping parents to exercise their parental authority. But the district court entirely failed to assess whether its enhanced Section 504 would serve that fundamental interest. Even an enhanced version of Section 504 would succeed in blocking signal bleed only if parents affirmatively decided to avail themselves of the means offered to them to do so. Inevitably some parents—probably a great many parents—will fail to take advantage of those means, out of inertia, indifference, or distraction. Under an enhanced version of Section 504, children of those parents, and friends of those children, would thus

remain exposed to sexually explicit signal bleed, and society's independent interest in protecting children would not be served. Under Section 505, by contrast, such children would remain protected, unless and until their parents exercised their choice to subscribe to a sexually explicit programming service.

The district court's hypothetical, enhanced Section 504 would also lead to at least the same limitation on the availability of appellee's programming as Section 505. The district court itself never analyzed whether cable operators would respond to its enhanced Section 504 in the same way that they responded to Section 505. But the court did find that, if an extremely modest number of households (less than 3% to 6%) sought blocking of a channel under Section 504, the cost of providing that blocking would lead cable providers to drop that programming altogether or time-channel it (if some kind of time-channeling option were offered). In fact, if the enhanced Section 504 hypothesized by the district court actually provided clear notice of the problem of signal bleed on sexually explicit channels and easy availability of blocking devices, it would certainly lead to a significant increase in the number of subscribers requesting such devices. Accordingly, it would lead cable operators to drop or time-channel appellees' programming—precisely the same result that the district court believed would follow from the application of Section 505.

II. The district court also erred in holding that our filing of a notice of appeal to this Court divested the district court of jurisdiction to rule on our motions to alter or amend, and to correct, the judgment. Because this Court's Rules leave uncertain the question whether such motions toll the time for appealing, a prudent litigant in a case in which direct appeal to this Court is authorized must file a notice of appeal even if the litigant believes that it has meritorious grounds to seek postjudgment relief from the district court. There is

no reason why such a notice of appeal should divest the district court of jurisdiction to rule on the motions for post-judgment relief. That is particularly true prior to the time when the case is docketed in this Court, because there is no possibility that the district court and this Court would both be taking action on the same case before that time. On the contrary, permitting the district court to rule on such motions before docketing in this Court would potentially clarify the issues on appeal or even make the further prosecution of the appeal in this Court unnecessary.

ARGUMENT

I. THE MEASURES REQUIRED BY SECTION 505 OF THE TELECOMMUNICATIONS ACT OF 1996 TO PROTECT CHILDREN AND THE PRIVACY OF THE HOME AGAINST SEXUALLY EXPLICIT PROGRAMMING ON CABLE TELEVISION ARE CONSISTENT WITH THE FIRST AMENDMENT

A. First Amendment Scrutiny Of The Regulation Of Sexually Explicit Material On Cable Television Must Be Conducted With Sensitivity To Society's Distinct Interests In Protecting Children And In Protecting Against Unwanted Intrusions Into The Privacy Of The Home

1. When reviewing government regulation of the content of constitutionally protected speech, this Court generally has held that such regulation is permissible only if it is narrowly tailored to serve a compelling interest. *Burson v. Freeman*, 504 U.S. 191, 198-199 (1992). The Court has also recognized, however, that "context is all-important," *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), when conducting judicial review of the regulation of indecency on broadcast media. In particular, the Court held in *Pacifica* that "special treatment of indecent broadcasting" is "amply justified," and it upheld a time-channeling regulation of indecency on

broadcast radio that prohibited the broadcast of such material during hours when children were likely to be in the audience. *Id.* at 750. The Court explained that among the justifications for such "special treatment" are the facts that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans"; indecency on television or radio "confronts the citizen * * * in the privacy of the home"; "the broadcast audience is constantly tuning in and out, [and] prior warnings cannot completely protect the listener or viewer from unexpected program content"; and "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 748-749. In light of those unique features, the Court held that a regulation that entirely prohibited indecent speech during much of the broadcast day was constitutional, even though a similar content-based restriction of non-obscene speech would surely be unconstitutional in many other contexts. See *id.* at 750-751.⁹

The Court has consistently adhered to the principles of *Pacifica*. For example, in *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 127 (1989), the Court noted that the "special treatment of indecent broadcasting" upheld in *Pacifica* was justified because the regulation at issue there "did not involve a total ban on broadcasting indecent material," but instead "sought to channel it to times of day when children most likely would not be exposed to it." *Ibid.* In addition, the Court pointed out that *Pacifica* "relied on the 'unique' attributes of broadcasting, noting that broadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is

⁹ See also 438 U.S. at 750-751 (Powell, J., concurring in part and concurring in the judgment) ("The result turns * * * on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes.").

'uniquely accessible to children, even those too young to read.'" *Ibid.* (quoting *Pacifica*, 438 U.S. at 733). More recently, in *Reno v. American Civil Liberties Union (ACLU)*, 521 U.S. 844 (1997), the Court held that "the most stringent review" applies to regulation of indecency on the Internet, but it reaffirmed that "special treatment of indecent broadcasting" by means of non-criminal regulation is appropriate, *id.* at 867, essentially for the reasons given above, see *id.* at 866-868.

2. The same "all-important" context that guided the Court's review of regulation of over-the-air broadcast indecency in *Pacifica* is present when the government regulates transmission of similar programming on cable television, especially when the regulation offers the same time-channeling option as in *Pacifica*. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), the Court considered a challenge to several statutory provisions that addressed indecency on cable television. None of the opinions in *Denver Area* suggested that regulation of indecency on cable television should be analyzed under standards that differ in any way from the standards governing regulation of indecency on over-the-air broadcast television and radio.

In a portion of the opinion authored by Justice Breyer that was identified as the opinion of the Court, he stated that, in order to resolve the issues in *Denver Area*, it was not necessary to "determine whether, or the extent to which, *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue." 518 U.S. at 755.¹⁰

¹⁰ In his separate opinion, Justice Kennedy, joined by Justice Ginsburg, stated that he joined that portion of the opinion "insofar as it applies strict scrutiny." See 518 U.S. at 812 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); see also *id.* at 803-805 (noting that "*Pacifica* conducted a context-specific analysis of the

But however the nature of the scrutiny under *Pacifica* is described, elsewhere in his opinion, in which he spoke for a plurality of the Court, Justice Breyer relied heavily on *Pacifica* to uphold one of the cable television regulations at issue there, *id.* at 744-748. Moreover, the plurality distinguished *Sable*, in which the Court held unconstitutional a ban on indecent telephone messages, on the ground that *Sable*, unlike *Denver Area*, involved "a communications medium, telephone service, that was significantly less likely to expose children to the banned material, was less intrusive, and allowed for significantly more control over what comes into the home than either broadcasting or the cable transmission system before us." *Id.* at 748. The plurality concluded that, with respect to the way in which "parents and children view television programming, and how pervasive and intrusive that programming is[,] * * * cable and broadcast television differ little, if at all." *Ibid.*

The separate opinion of Justice Kennedy in *Denver Area* also noted the significance of context in reviewing regulation of indecency on television and radio. Relying on *Pacifica*, Justice Kennedy stated that cable television channels are "uniquely accessible to children" and that the "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue." 518 U.S. at 804 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). In Justice Kennedy's view, those unique features of television program-

FCC's restriction of indecent programming during daytime hours," and rejecting "a blanket rule of lesser protection for indecent speech").

ming raise "concerns [that] are weighty and will be relevant to whether the law passes strict scrutiny." *Ibid.*¹¹

3. There are factors present in this case that make it even clearer than in *Pacifica* that some degree of governmental flexibility in regulation is warranted. First, the regulation in *Pacifica* was aimed directly at a purposeful communication between the broadcaster and willing listeners, and it rested on the ground that the material broadcast was indecent and should not be available to children. By contrast, Section 505 is aimed not at the intended communication—the communication between those who produce sexually explicit cable programs and those who subscribe to them—but at a byproduct of that communication (signal bleed) that can be harmful to children.¹² Cf. *Schneider v. State*, 308 U.S. 147, 162 (1939). Insofar as the sexually explicit programmer can communicate with its audience without creating that byproduct—as is the case on cable systems with digital or other equipment that completely blocks the programming to nonsubscribers (see page 40,

¹¹ In his opinion concurring in the judgment in part and dissenting in part in *Denver Area*, Justice Thomas noted that the Court's "precedents establish that government may support parental authority to direct the moral upbringing of their children by imposing a blocking requirement as a default position." 518 U.S. at 832. Under that principle, Section 505 is constitutional.

¹² As the district court noted at the preliminary injunction stage of this case, the aim of the statute is also one of the differences between Section 505 and one of the provisions held unconstitutional in *Denver Area*. As the district court explained, "Section 505 differs * * * from the statute at issue in *Denver Consortium* and from most statutes that are directed at speech or at the regulation of speech in that the target of § 505 is not the speech itself, i.e., sexually explicit adult programming. The target is signal bleed, a secondary effect of the transmission of that speech." J.S. App. 69a. See also *ibid.* ("[S]ignal bleed is intruding into the homes of television viewers who have chosen not to receive the underlying sexually explicit programming.").

infra), Section 505 imposes no cognizable restriction on speech at all. But insofar as the intended communication creates signal bleed as a byproduct—a byproduct in which appellee has not asserted any independent First Amendment interest, see J.S. App. 42a (noting that appellee did not "contend that signal bleed itself is protected speech")—Section 505 requires that it be blocked or time-channelled to hours when children are not likely to be in the viewing audience.¹³ Because Section 505 is thus aimed not at expressive speech within its intended sphere, but at a byproduct of that speech that creates a risk to children, the interests served by Section 505 outweigh any countervailing First Amendment interests even more than they did in *Pacifica*.¹⁴

Additionally, the burden on speech imposed by Section 505 is much less than that imposed by the regulation in *Pacifica*, thus providing further support for the need for some regulatory flexibility. Unlike in *Pacifica*, where time-

¹³ Thus, the effect of Section 505 is carefully targeted at parties (programmers of sexually explicit material and non-subscribers) who have no interest in communicating with each other.

¹⁴ *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), is not to the contrary. In that case, the Court held unconstitutional an ordinance forbidding drive-in theaters from showing movies containing nudity visible from a public street. In addressing the claim that the ordinance was constitutional as an attempt to protect minors, the Court held that the ordinance was overbroad because it "is not directed against sexually explicit nudity, nor is it otherwise limited." *Id.* at 213. Section 505, by contrast, is directed solely at sexually explicit programs broadcast on sexually explicit programming services. Moreover, unlike the ordinance in *Erznoznik*, Section 505 is directed at an instance "when the speaker intrudes on the privacy of the home," *id.* at 209—a context in which the Court in *Erznoznik* acknowledged the government's authority to act. *Ibid.* Cf. *People v. Starview Drive-In Theatre, Inc.*, 427 N.E.2d 201, 211-212 (Ill. App. Ct. 1981) (holding constitutional an ordinance forbidding drive-in theaters from showing sexually explicit material visible from the street or a private residence), appeal dismissed, 457 U.S. 1113 (1982).

channeling to the safe-harbor hours was the only way in which the regulated communication could be made, Section 505 permits transmission of sexually explicit material at any time of the day or night on the increasing number of cable systems that can completely block the signal, by digital or other means, to nonsubscribers. In addition, the burden imposed on speech by Section 505, even on those cable systems that time-channel appellee's programming, is not great. The district court found that one half or more of appellee's viewers watch during the safe-harbor hours anyway, and their viewing therefore would not be affected by time-channeling.¹⁵ Moreover, the great majority of appellee's subscribers consist of those who watch on a pay-per-view basis,¹⁶ and its average pay-per-view subscriber purchases appellee's programming five times per year, Tr. 90-91, and watches, on average, only one hour each time, DX Vol. 2, No. 78, at 7. And even those subscribers may make use of the videocassette recorders now located in most American homes to tape programming during the safe-harbor hours and watch it whenever they wish.¹⁷ Both this Court and the

¹⁵ The district court found that "30 to 50% of all adult programming is viewed by households prior to 10 p.m." J.S. App. 18a. That means that 50-70% of adult programming is viewed after 10:00 p.m., during the safe-harbor hours.

¹⁶ The district court found that "revenues from pay-per-view programming constitute the vast majority of Playboy's revenue." J.S. App. 16a n.13. The court found that "[t]he number of subscribers watching Playboy Television in a year is between 800,000 and 1.7 million." *Id.* at 18a n.16. The far smaller number of average monthly subscribers can be found in an exhibit that was filed under seal to preserve appellee's confidential business information, DX Vol. 11, No. 134, at PBD005 (Average Monthly Subs 1Q 97).

¹⁷ The FCC has estimated that, as of June 1998, 88% of all households with televisions own at least one VCR. *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 F.C.C.R. 24284, para. 106 (1998) (*Fifth Annual Report*).

lower courts have recognized that some restriction on the communications activities of adults may be constitutional if necessary to serve the compelling interest in protecting minors.¹⁸

Finally, the risks to children posed by appellee's programming are substantially greater than those present in *Pacifica*. Unlike the one-time broadcast of inappropriate language—with no accompanying visual representation—at issue in *Pacifica*, this case involves channels that carry "virtually 100% sexually explicit adult programming." J.S. App. 6a, 42a, 47a. As described above and in our lodgings (see pages 4-6, *supra*), the programming at issue here consists largely of frequent, close-up, and graphic scenes of sexual intercourse and related sex acts. The result, due to signal bleed, is "an unbroken continuum of sexually explicit sounds and images, delivered without invitation to [children's] home[s]." *Id.* at 73a n.26. Indeed, the sound tracks from appellee's programming alone are much coarser and far more offensive than the broadcast that was at issue in *Pacifica*.

¹⁸ See *Denver Area*, 518 U.S. at 741 (plurality opinion) ("This Court * * * has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech."); *Sable Communications*, 492 U.S. at 128 (suggesting that restrictions on dial-a-porn to ensure use only by adults may be constitutional); *Action for Children's Television*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (sustaining statutory provision and FCC regulation prohibiting broadcasting of indecent material between 6:00 a.m. and 10:00 p.m.); *Crawford v. Lungren*, 96 F.3d 380, 387-389 (9th Cir. 1996) (ordinance banning sale of materials harmful to minors in unattended news racks held constitutional), cert. denied, 520 U.S. 1117 (1997); *American Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990) (statute banning display of materials harmful to minors in portions of stores in which minors are permitted held constitutional); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, 1394-1395 (8th Cir. 1985) (same); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288-1289 (10th Cir. 1983) (same).

See page 6 and note 4, *supra*. Children generally watch more television than do their parents, see *Denver Area*, 518 U.S. at 744-745; they often do so when their parents are not present, and they are thus likely to be subject to signal bleed before their parents even know about it.¹⁹ Accordingly, the risks to children posed by signal bleed—and the corresponding risks to society that would result from eliminating the most effective means to deal with the problem—are highly relevant to the First Amendment analysis.

4. a. Regardless of how the standard of review is characterized, each Member of the Court in *Denver Area* recognized—as did the Court in *Pacifica*—that the government is entitled to some flexibility in regulating indecency on cable television. That conclusion is correct. In many other contexts, the government's burden to justify regulation that has effects on protected speech is particularly heavy, because the potential cost of curtailing government regulation is presumed to be less than the potential cost of curtailing speech. Here, however, for the reasons given above, the cost of unduly limiting society's ability to impose the marginal limitation on speech that results from Section 505 would be extraordinarily high. Indeed, in light of such potential costs, it is not surprising that the Court has hesitated to apply a rigid analysis to regulation of indecency on television and radio.

In the present case, it would be appropriate to recognize the needed flexibility to accommodate society's interests in the context of indecent programming on broadcast and cable systems, regardless of the level of scrutiny applied, by giving effect to the long-accepted principle "that courts must accord substantial deference to the predictive judgments of Con-

¹⁹ There was substantial evidence at trial that parents do not become aware of signal bleed until after their children have encountered it. See, e.g., Cavalier Dep. 10-16, 17; DX Vol. 1, No. 45, paras. 4-6 (Mahlo Decl.); Omlin Dep. 16; Ciciora Dep. 45. See also J.S. App. 35a.

gress." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality opinion); see also *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997) (plurality opinion); *Action for Children's Television*, 58 F.3d at 667. In particular, Congress's judgment that a particular means (such as Section 505) of addressing the problem of indecency on television or radio is necessary is entitled to substantial deference. Of course, Congress's determination that a particular measure is necessary must reflect a reasonable choice among the available alternatives, and judicial scrutiny is appropriate "to assure that * * * Congress has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting*, 512 U.S. at 666. Moreover, the measure chosen must directly aim at the problem of the availability of indecency to minors on television or radio. But mere speculation that some other, untested (and, in this case, ill-defined) measure would also accomplish the desired end is insufficient to upset Congress's judgment. The need to respect Congress's predictive judgments in this context is particularly clear, because, as we explain below (see pages 35-40, *infra*), the question whether Section 505 is less restrictive than other alternatives depends in part on predictions about the effects of Section 505 and other hypothetical measures on choices made by cable-operator third parties.²⁰

If these principles are heeded, the district court's judgment must be reversed. The district court held Section 505 unconstitutional solely on the ground that, as compared with an enhanced version of Section 504 that it hypothesized, Sec-

²⁰ Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)) (standing does not lie where claimed injury is the result of "the independent action of some third party not before the Court"); *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.").

tion 505 was not the least restrictive measure that could have been enacted to achieve Congress's compelling interests. As we demonstrate below, even under the most stringent scrutiny employed by this Court, that conclusion was mistaken, because the hypothesized alternative would not fully serve the compelling interests advanced by Section 505 (see pages 29-35, *infra*), and would not in any event turn out to be less restrictive of speech (see pages 35-40, *infra*). Even if there were some doubt on those points, however, there can be no doubt that Congress's determination that Section 505 was necessary to achieve its ends—and that no other likely measure could accomplish its goals without imposing at least as great a burden on speech—was at least a reasonable one. Taking into account the “all-important context” in which Section 505 operates, that should be sufficient to establish that Section 505 is constitutional.

b. Far from giving careful consideration to the context in which Section 505 operates, as required by *Pacifica* and the subsequent decisions of this Court discussed above, the district court gave it no weight at all. The district court did acknowledge at one point that “the context of [Section 505's] content-based restriction must * * * be considered,” because “[c]able television is a means of communication that is both pervasive and to which children are easily exposed.” J.S. App. 26a. But the court proceeded to attach essentially no significance to that “context” in holding that “[t]he Government must prove that * * * no less restrictive measures are available to achieve the same ends the government seeks to achieve.” *Ibid.* The court applied its “least restrictive alternative” test in a particularly rigorous manner, holding that Section 505 is unconstitutional solely because the court could imagine an alternative, entirely hypothetical scheme whose practicality, cost, and legality have never been tested. See *id.* at 35a-39a.

Indeed, the district court held its enhanced version of Section 504 to be a less restrictive alternative to Section 505 despite the fact that there had been no opportunity for litigation regarding its adequacy or consequences. Appellee had relied on Section 504 as enacted—without all of the district court's enhancements—as a less restrictive alternative, see J.S. App. 19a, and the government therefore had litigated that issue, not the adequacy of the district court's hypothetical version of the statute.²¹ Apparently, the district court believed that regulations like Section 505 are so disfavored that the court's ability to hypothesize an entirely untried and unscrutinized alternative was sufficient to establish that Section 505 is unconstitutional. The district court's methodology was inconsistent with this Court's emphasis on the care with which review must proceed in this context, so as not unduly to impair society's ability to serve the compelling interests at stake.

B. Even If Strict Scrutiny Applies, The Hypothetical Version Of Section 504 Posited By The District Court Is Not An Adequate And Less Restrictive Alternative

Even under the exceptionally strict standard of review it employed in this case, the district court erred in concluding that its enhanced version of Section 504 would be sufficient to promote the interests underlying Section 505 and that it would be less restrictive than Section 505.

²¹ The district court agreed with the government that “[i]f ‘adequate notice’ is not provided, § 504 will no longer be a viable alternative to § 505.” J.S. App. 38a. See also *id.* at 19a (“[I]f the § 504 blocking option is not being promoted, it cannot become a meaningful alternative to the provisions of § 505.”); *id.* at 20a (“If * * * § 504 is to be an effective alternative to § 505, adequate notice of the availability of the no-cost blocking devices is critical.”).

1. *The enhanced Section 504 would not be a suitable alternative to Section 505 because it does not fully serve the compelling interests underlying Section 505*

In order to qualify as a "less restrictive alternative," a measure must be not only less restrictive; it must also be "as effective" as the regulation being challenged. *Reno v. ACLU*, 521 U.S. at 874. See also *Sable Communications v. FCC*, 492 U.S. at 130-131 (narrow tailoring requirement not met when the record suggests a less restrictive and possibly "extremely effective" alternative); *Dial Info. Serv. Corp. v. Thornburgh*, 938 F.2d 1535, 1541, 1542 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992). The district court's enhanced version of Section 504 would not be a satisfactory alternative to Section 505, because it would not be as effective in protecting the compelling interests that the district court itself recognized supported Section 505.

The district court identified three interests that support Section 505:

1) the Government's interest in the well-being of the nation's youth—the need to protect children from exposure to patently offensive sex-related material; 2) the Government's interest in supporting parental claims of authority in their own household—the need to protect parents' right to inculcate morals and beliefs [i]n their children; and 3) the Government's interest in ensuring the individual's right to be left alone in the privacy of his or her home—the need to protect households from unwanted communications.

J.S. App. 26a-27a. See *id.* at 32a (concluding, after discussing each of the above interests, "that § 505 addresses three interests which in sum can be labeled 'compelling'").²²

²² Although the district court ultimately accepted that sufficient evidence had been introduced to establish each of the interests, it noted that it was "troubled by the absence of evidence of harm presented both before Congress and before [the court] that the viewing of signal bleed of sexually explicit programming causes harm to children." J.S. App. 30a. The district court's concern was misplaced. The government need not introduce empirical evidence in each case that minors are harmed by exposure to indecent, sexually explicit material. Concerns about minors' exposure to such material are based on commonly held moral views about the upbringing of children, not only on empirical, scientific evidence. This Court has repeatedly held, over a period of many years and without referring to specific sociological or psychological data demonstrating harm, that society has a compelling interest in protecting children from exposure to indecent, sexually explicit materials. See, e.g., *Reno v. ACLU*, 521 U.S. at 869 ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors' which extend[s] to shielding them from indecent messages that are not obscene by adult standards.") (quoting *Sable Communications*, 492 U.S. at 126); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683-684 (1986); *New York v. Ferber*, 458 U.S. 747, 756-757 (1982); *Ginsberg v. New York*, 390 U.S. 629, 640-643 (1968). In the *Denver Area* case, the Court's unanimity on this point was particularly striking. See 518 U.S. at 743 (plurality opinion) ("[T]he provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material."); *id.* at 779 (O'Connor, J., concurring in part and dissenting in part) (The regulations at issue "serve an important governmental interest: the well-established compelling interest of protecting children from exposure to indecent material."); *id.* at 806 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Congress does have * * * a compelling interest in protecting children from indecent speech."); *id.* at 832 (Thomas, J., concurring in the judgment in part and dissenting in part) ("Congress has a 'compelling interest in protecting the physical and psychological well-being of minors' and * * * its interest 'extends to shielding minors from the influence of [indecent speech] that is not obscene by adult standards.'").

This Court has carefully distinguished between the first and second of those interests in the past, referring in *Reno v. ACLU* both to "the State's independent interest in the well-being of its youth," and to "the principle that 'the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.'" 521 U.S. at 865 (emphasis added) (quoting *Ginsberg v. New York*, 390 U.S. at 639). Our society has long recognized the authority of parents to decide how to raise their children. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). But it has also long recognized that society itself has an interest in the upbringing of youth, especially when parents, as a result of inertia or indifference or the competing claims of other responsibilities, fail to exercise their own authority. See *id.* at 166-170. See also *Action for Children's Television*, 58 F.3d at 661-663.

In determining whether its hypothetical, enhanced version of Section 504 would provide a less restrictive alternative to Section 505, the district court entirely ignored society's independent interest in seeing to it that children are not exposed to sexually explicit materials. The district court stated:

[W]ith adequate notice of the issue of signal bleed, parents can decide for themselves whether it is a problem. Thus to any parent for whom signal bleed is a concern, § 504, along with 'adequate notice,' is an effective solution. In reality, § 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights.

J.S. App. 37a-38a. It seems highly unlikely that the district court was correct in its apparent belief that its enhanced version of Section 504 would be sufficient to inform all parents of the problem of signal bleed and to permit them to eliminate it easily and effectively. But even if it were, such a

measure would serve only two of the interests the district court identified—the interests in "protect[ing] parents' right to inculcate morals and beliefs [i]n their children" and "ensuring the individual's right to be left alone in the privacy of his or her home." *Id.* at 26a. Thus, under such an enhanced version of Section 504, parents who had strong feelings about the matter could see to it that their children did not view signal bleed—at least in their own homes.

The district court's enhanced version of Section 504 would not, however, serve society's independent interest in protecting minors from exposure to indecent, sexually explicit materials, and the district court's reasoning takes no account of that interest. Even an enhanced version of Section 504 would succeed in blocking signal bleed only if, and after, parents affirmatively decided to avail themselves of the means offered them to do so. There would certainly be parents—perhaps a large number of parents—who out of inertia, indifference, or distraction, simply would take no action to block signal bleed, even if fully informed of the problem and even if offered a relatively easy solution.²³ There also are

²³ Studies have confirmed that sales of a good or service will be higher if consumers are required to take action to refuse it than if a mere failure to act is deemed to be a refusal of the good or service. For example, telephone companies offering an "optional maintenance plan" for wires inside the subscriber's residence achieved a median subscription rate of 44% among 50 positive option offers (the subscriber must affirmatively request the plan) and a median rate of 80.5% among 22 unilateral negative option offers. See Dennis D. Lamont, *Negative Option Offers in Consumer Service Contracts: A Principled Reconciliation of Commerce & Consumer Protection*, 42 UCLA L. Rev. 1315, 1330-1331 (1995). Similarly, Canadian cable programmers have reported that such "negative option" offers for new channels resulted in 60%-70% subscription rates, far higher than the 25% rates resulting from standard (positive option) marketing methods. *Id.* at 1331-1332. See also *In re Columbia Broad. Sys., Inc.*, 72 F.T.C. 27, 337-338 (1967) (FTC action against record club) ("In practice, the Club's officials anticipate in advance that approximately 35% of the

children who would view signal bleed at the homes of friends whose parents, due to the same factors, do not act under an enhanced Section 504 to block signal bleed. See J.S. App. 52a, 80a. Society has an interest independent of the choices made (or not made) by parents in seeing to it that children are not exposed to sexually explicit materials. Section 505 would protect that interest, by ensuring that children are not exposed to signal bleed as a result of inertia, indifference, or distraction; Section 504, by contrast, would not protect that interest, since children would be exposed to signal bleed of sexually explicit materials whenever parents failed, for whatever reason, to take the affirmative steps necessary to obtain blocking.

We are not referring here to that presumably very small number of children whose parents positively want their children to be exposed to sexually explicit programming. Even if we assume, *arguendo*, that the interests of those parents should prevail over the interests of society in protecting children from indecent material (but see *Prince*, 321 U.S. at 166-170; cf. *Reno v. ACLU*, 521 U.S. at 878 (reserving that question in the context of the Internet)), such parents' interests would be protected equally well either by Section 505 or by a hypothetical enhanced Section 504, for under either

members of its largest ('popular') division will not return the card and hence will receive and accept the record selected for them by the Club.").

Indeed, precisely because negative option sales give an unfair advantage to the provider of a good or service, Congress has expressly prohibited cable operators from using negative option billing. See 47 U.S.C. 543(f) ("A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name," and the subscriber's "failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment."); 47 C.F.R. 76.981 (FCC regulation prohibiting negative option billing). See also 16 C.F.R. 425.1 (FTC regulation regarding negative option plans).

they would obtain access to sexually explicit channels by subscribing to them.²⁴ The children of parents who fail to act as a result of inertia, indifference, or distraction, however, would be protected only by Section 505. The district court gave no weight whatsoever to society's independent interest in protecting those children when it ruled that a hypothetical enhanced version of Section 504 would be an adequate alternative to Section 505.

2. *The enhanced Section 504 is not less restrictive than Section 505 because it is reasonably likely to lead to at least the same effect on the availability of appellee's programming as Section 505*

The court's analysis of the restrictions imposed by Section 505 was based on its finding that "time channeling has proven to be the method of compliance of choice among" cable operators because "no other system-wide blocking technique is economically feasible." J.S. App. 33a & n.23. See also *id.* at 16a-17a.²⁵ In other words, with respect to cable

²⁴ We leave out of the analysis altogether those parents or other individuals who do not want to subscribe to Playboy's programming but who want signal bleed because they would like to receive Playboy's sexually explicit programming without paying for it. Such individuals have no cognizable interest in receiving signal bleed from a channel to which they do not subscribe.

²⁵ Appellee has periodically argued that there are various other alternative methods to protect children against signal bleed from sexually explicit programming services, such as set-top converters and so-called child lock-out devices on some modern television sets. See Mot. to Aff. 4-5. The district court, however, relied only on the enhanced Section 504, rather than any of those methods, as a less restrictive alternative to Section 505. Extensive evidence at trial demonstrated that those alternative methods are ineffective, difficult for parents to operate, and easy for children to circumvent. See Defs. Post-Trial Reply 15-18. The district court's reliance on its enhanced Section 504 as the alternative suggests that it found that evidence concerning the deficiencies of other proffered alternatives highly probative. As appellee concedes, the "V-chips" now included in

systems that do not yet employ digital or other means of transmission that eliminate signal bleed, "the distribution of lockboxes to a sufficient number of customers to effectively control the problem of signal bleed is not economically feasible." *Id.* at 21a. In turn, the court reasoned, the adoption of such time-channeling by cable operators "amounts to the removal of all sexually explicit programming at issue during two thirds of the broadcast day from all households on a cable system." *Id.* at 33a. Time-channeling thus "diminishes Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech." *Ibid.*

Based on the court's own factual findings, there is no basis for concluding that an application of the court's hypothetical, enhanced version of Section 504 would not have at least the same effects; that is so because cable operators under an enhanced Section 504 could be expected either to drop appellee's programming altogether or to transmit appellee's programming only during the safe-harbor hours (that is, if time-channeling was also an option in a hypothetical, enhanced Section 504). Indeed, the same economic factors that now lead to time-channeling under Section 505 would lead to dropping of appellee's sexually explicit programming services altogether (or perhaps, if the option were offered, time-channeling) under Section 504.

The district court itself noted the testimony in the record that the cost of distributing lockboxes to 3% of a cable system's customers would equal all of the revenue the operator derived from its sexually explicit channels. J.S. App. 21a-22a. The court added that, if a cable operator were willing to

most new television sets "do not address the issue of signal bleed," Mot. to Aff. 5 n.4, because the imperfect scrambling that creates the problem of signal bleed distorts or obliterates the program classification (ratings) codes that the V-chip must interpret in order to block the programming. DX Vol. 10, No. 82, paras. 9-15.

amortize the cost of the lockboxes over five years, the number of lockboxes that could be distributed would rise only to 6% of the subscriber base. *Id.* at 22a. In actuality, cable operators could be expected to drop (or time-channel) sexually explicit channels long before the number of subscribers who requested lockboxes reached the 3% to 6% range. As the district court found, "[e]conomic theory would suggest that profit-maximizing cable operators would cease carriage of adult channels" before exhausting *all* revenues from such channels; rather, they would take action when the "costs rose to such a point that the profit from adult channels was less than the profit from channels unlikely to require blocking." *Ibid.* Therefore, a relatively minor boost in the number of subscribers seeking lockboxes would be sufficient to lead to dropping Playboy's programming altogether under an enhanced Section 504 (or time-channeling, if such an option were included in an enhanced Section 504 as a means of compliance)—and a consequent effect on the availability of appellee's sexually explicit programming at least as great as that the district court found to occur under Section 505.

A significant increase in the number of subscribers seeking lockboxes would inescapably follow if a truly effective notice requirement were added to Section 504. The district court itself found that the actual Section 504—without enhanced notice and without easy availability of blocking devices—had led to less than 0.5% of households requesting blocking. J.S. App. 20a & n.19. The court intended to design its enhanced version of Section 504 specifically in order to provide each subscriber with genuine, easily understandable notice of the problem of signal bleed and a quick and easy means to stop it through ready availability—via "a telephone call," *id.* at 37a—of blocking devices. See *id.* at 36a-37a.²⁶

²⁶ Whether a scheme of adequate notice and easy availability of blocking devices could be devised that did not result in exorbitant costs,

Moreover, such notice would have to be repeated on a regular basis (though the district court did not specify how often) on non-sexually explicit channels, and special notice would have to be given whenever a cable operator changed the channel on which a sexually explicit programming service was carried. *Id.* at 37a. If a genuinely effective system of notice and easily available blocking were instituted and proved to be as effective as the district court evidently anticipated, the number of subscribers requesting blocking could be expected to exceed the minimal number necessary to render carriage of the sexually explicit channels uneconomical. That is especially so in light of the fact that the various forms of notice contemplated by the district court, including regular notice on the cable operators' other channels, would themselves impose burdens, in the form of financial costs and interference with editorial discretion, on cable operators.²⁷

Indeed, the district court's enhanced version of Section 504 could well result in a *greater* limitation on the availability

insuperable enforcement difficulties, or distinct legal problems is open to substantial doubt. For example, the evidence at trial showed that, even where parents have notice of the problem of signal bleed, parents attempting to remedy the problem have sometimes had to make repeated phone calls to their cable operators—and even to local government supervising authorities—before they could obtain blocking of the signal bleed. See J.S. App. 21a (citing evidence). In light of the built-in financial incentive that cable operators have to discourage blocking (since blocking costs them money), it should not be surprising that this kind of problem has arisen.

²⁷ At least one of the notice mechanisms identified by the district court—advertising on non-sexually explicit channels the problem of signal bleed of sexually explicit programming and the availability of Section 504 blocking—could easily have the anomalous effect of informing children of the availability of signal bleed and encouraging them to watch it in those homes in which parents do not happen to request the Section 504 blocking solution.

of appellee's programming than does Section 505. Section 504, as enacted by Congress, does not include a safe-harbor provision like Section 505. Accordingly, if Section 504 were enhanced—as the district court envisioned—by adding requirements for notice to subscribers of the problem of signal bleed and the easy availability of blocking devices, the increased costs that cable operators would have to incur in affording notice and furnishing blocking devices might well make it uneconomical for them to carry appellee's programming at all. That would amount to a greater limitation on the availability of appellee's speech than the time-channeling that can be expected to result from Section 505. That consequence would be even more likely to result if Section 504 were altered to provide not only for the district court's enhancements, but also for a safe-harbor like that in Section 505. At least some subscribers, given effective notice of the problem, would likely seek lockboxes even if their cable operators limited the availability of appellee's programming to the safe-harbor hours. To avoid the costs of supplying those lockboxes, many cable operators would, once again, simply choose to drop appellee's programming altogether.

Although the district court made the key factual findings regarding the economic impact of subscriber requests for lockboxes on which our argument here relies, see J.S. App. 21a-22a, the court simply overlooked those findings when it analyzed the relative effects on the availability of appellee's programming resulting from Section 505 and alternatives. To be sure, the district court noted that "Section 504 * * * is less restrictive of the First Amendment rights of Playboy and its subscribers" than Section 505 because it operates on a voluntary basis and permits cable operators to broadcast appellee's programming 24 hours per day. *Id.* at 34a. But that finding concerns the actual Section 504, as enacted by Congress and containing no notice provisions—a statute that the district court itself viewed as an inadequate alternative

to Section 505. See J.S. App. 38a. Perhaps because no party had suggested that an enhanced Section 504 would be a less restrictive alternative and the parties' argument was therefore not directed to that point, the district court never analyzed whether the enhanced version of Section 504 that it had hypothesized would result in the same limitation on the availability of appellee's programming as Section 505. Had it done so, its own factual findings would have led to the conclusion that Section 504 would be at least as restrictive as Section 505. At the very least, the proposition that a fully effective notice requirement of the sort the district court posited would *not* result in at least the same restriction on speech as Section 505 has not been demonstrated with the clarity necessary to invalidate an Act of Congress on least-restrictive-alternative grounds.

C. At The Very Least, Section 505 Is Constitutional As Applied To The Transmission Of Sexually Explicit Programming By Operators That Have The Technology To Eliminate Signal Bleed

Finally, it is significant that Section 505 imposes a minimal burden on speech of those cable systems that have the ready capability to use digital or other modern technologies that completely eliminate signal bleed when transmitting sexually explicit programming services. The district court noted that an increasing number of cable systems use such technology. J.S. App. 9a, 18a n.17. Indeed, there was evidence in this case that all of the cable systems that transmit Adult-Vision, a sexually explicit programming service operated by Playboy, have the capacity for complete encryption of programming so that nonsubscribers will not have any access to it. DX Vol. 8, No. 237, at PEI000159A. With respect to systems that already employ such digital or other means of transmission that eliminate signal bleed, Section 505 requires only that the cable operators—whose systems sometimes include both analog and digital components—use

the technology that they already have in place to ensure that there is no signal bleed of sexually explicit programming services. It therefore imposes no burden on speech with respect to those systems, and it should be held constitutional at least in application to them.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT IT WAS DIVESTED OF JURISDICTION TO DECIDE POST-TRIAL MOTIONS WHEN THE GOVERNMENT FILED A NOTICE OF APPEAL OF THE PERMANENT INJUNCTION

The district court's dismissal of the government's post-trial motions was mistaken. The first notice of appeal, filed on January 19, 1999, within the 20-day period prescribed by Section 561(b) of the Act but after the post-trial motions were filed seven days earlier, did not deprive the district court of jurisdiction to consider the government's motions relating to the terms of the judgment.

A. In an appeal to a court of appeals, the filing of a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) or the filing (not more than ten days after entry of judgment) of a motion for relief under Federal Rule of Civil Procedure 60(a) tolls the time within which the notice of appeal must be filed. Fed. R. App. P. 4(a)(4)(A)(iv) and (vi). A notice of appeal filed before disposition of such a motion becomes effective only when the order disposing of the last such motion is entered. Fed. R. App. P. 4(a)(4)(B)(i). The reason for this rule is that when such a motion is filed, "the case lacks finality." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2821, at 220 (2d ed. 1995).

This Court's rule governing certiorari, Sup. Ct. R. 13.3, is similar to Rule 4(a)(4) of the Federal Rules of Appellate Procedure in that it provides for tolling of the time for filing a certiorari petition while a petition for rehearing is pending in

the court of appeals. The Court's rules governing appeals, however, do not address the consequences of filing a Rule 59(e) or Rule 60(a) motion in the district court. The time limits for filing a notice of appeal in such a case are "not free from doubt * * * because Rule 18.1 does not contain the statement, in former appeal Rule 11.3 (and in current certiorari Rule 13.3), that 'if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties * * * runs from the date of the denial of rehearing or the entry of a subsequent judgment.'" Robert L. Stern et al., *Supreme Court Practice* § 7.2(c), at 388 (7th ed. 1993). See also *ibid.* (noting that it is "most unlikely" that this Court meant to abandon that rule *sub silentio*). Through caution in this uncertain area of the law, we filed a notice of appeal within 20 days of entry of the injunction.²⁸

B. Our filing of the first notice of appeal while the two post-trial motions were pending before the district court did not deprive the district court of jurisdiction to consider those motions. To begin with, Rule 60(a) itself permits a district court to correct clerical mistakes in a judgment while an ap-

²⁸ In *FCC v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984), the Court held that under former Supreme Court Rule 11.3, a direct appeal taken during the pendency of a Rule 59 motion was permissible since the motion did not seek alteration of the rights adjudicated in the original judgment. See *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212 (1952) ("The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."). In this case, the post-trial motions arguably did not seek to alter the rights adjudicated. The Rule 59(e) motion here asked the district court to limit the injunction to Playboy and thus would not have affected Playboy's rights. The Rule 60(a) motion asked the district court to include in its injunction what the court in its underlying decision announced it was requiring—that Playboy must ensure in its contractual arrangements that cable operators provide "adequate notice" of the availability of free lockboxes.

peal is pending: "During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." On March 18, 1999, when the district court dismissed the Rule 60(a) motion for lack of jurisdiction, this appeal had not yet been docketed in this Court. Accordingly, the district court had jurisdiction to correct the mistake "just as if the case were still pending in the district court." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2856, at 251 (2d ed. 1995).²⁹

The filing of the notice of appeal also did not divest the district court of jurisdiction to rule on the Rule 59(e) motion that was already pending when the notice of appeal was filed. This Court's Rule 18.1, which governs the commencement of appeals to this Court, is comparable to Rule 4 of the Federal Rules of Appellate Procedure as it existed before the 1979 amendments. Interpreting the pre-1979 Rule 4, this Court concluded in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58-59 (1982) (per curiam), that while a district court lacked jurisdiction to entertain a Rule 59(e) motion after a notice of appeal had been filed, "if the timing was reversed—if the notice of appeal was filed after the motion to vacate, alter, or amend the judgment—* * * the district court retained jurisdiction to decide the motion, but the notice of appeal was nonetheless considered adequate for purposes of beginning the appeal process." The reason this "theoretical inconsistency" was permitted under the pre-1979 rule was that there was little danger that a court of appeals and a district court would be acting simultaneously on the same judgment, since a district court at that time did not

²⁹ Even if the case had already been docketed in this Court by March 18, Rule 60(a) itself would have permitted the district court to adjudicate the motion "with leave of [this] Court."

automatically notify the court of appeals that a notice of appeal had been filed. *Id.* at 59.³⁰

A direct appeal to this Court under Rule 18.1 functions similarly. After the notice of appeal is filed, the appellant is given 60 days within which to file its jurisdictional statement. Until the matter is docketed in this Court, there is no chance that the district court would be acting on a judgment at the same time as this Court. Because the jurisdictional statement in this case had not been filed at the time the district court dismissed the Rule 59(e) motion, that dismissal was improper and should be reversed.³¹ A litigant who wants to file a post-judgment motion should not have to risk forfeiting the right to appeal in order to do so.

³⁰ As the Court explained in *Griggs*, the 1979 amendments to Rule 4 altered the situation by making it clear that the court of appeals had no jurisdiction so long as a motion to vacate, alter, or amend the judgment was pending in the district court. 459 U.S. at 59-60. This in turn created a trap for the would-be appellant who failed to file a second notice of appeal after the disposition of the post-trial motion. Accordingly, Rule 4 was modified again in 1993 to provide that a notice of appeal filed after judgment but before the disposition of a post-trial motion "becomes effective to appeal a judgment or order * * * when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(i).

³¹ Alternatively, if the filing of the Rule 59(e) motion tolled the time to file the first notice of appeal under both Section 561(b) of the Telecommunications Act of 1996 (110 Stat. 143) and 28 U.S.C. 1253, and if it is concluded that the Rule 59 motion "actually seeks an 'alteration of the rights adjudicated' in the court's first judgment," *FCC v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984) (quoting *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942)), then the first notice of appeal may have been ineffective, at least insofar as the government sought to challenge the injunction as a final judgment. An ineffective notice of appeal would not divest the district court of jurisdiction. In that event, it should be noted that the second notice of appeal would remain sufficient to bring this case properly before this Court.

CONCLUSION

The judgment of the district court (and, if necessary, the March 18, 1999, order of the district court) should be reversed.

Respectfully submitted.

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No. 98-1682

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNITED STATES OF AMERICA, et al.,
Appellants,

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellee.

On Appeal from the United States District Court
for the District of Delaware

BRIEF OF APPELLEE

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Appellee Playboy Entertainment Group, Inc. ("PEGI") notes that it is a non-publicly traded corporation organized under the laws of Delaware and is a wholly-owned subsidiary of Playboy Enterprises International, Inc. ("PEII"), a non-publicly traded corporation organized under the laws of Delaware. PEII is a wholly-owned subsidiary of PEI Holdings, Inc. ("PEI Holdings"), a non-publicly traded corporation organized under the laws of Delaware. PEI Holdings is a wholly-owned subsidiary of Playboy Enterprises, Inc., a publicly traded corporation organized under the laws of Delaware.

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On Appeal from the United States District Court
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BRIEF OF APPELLEE

Appellee Playboy Entertainment Group, Inc. ("Playboy") respectfully requests that this Court affirm the decision of the three-judge district court that Section 505 of the Telecommunications Act of 1996, 47 U.S.C. § 561 (Supp. III 1998) ("the Act"), violates the First Amendment to the United States Constitution. Playboy further asks that this Court affirm the district court's dismissal of Appellants' post-trial motions to modify the judgment.

STATEMENT

At issue here is Section 505 of the Telecommunications Act of 1996, a statute that forced Playboy Entertainment Group, Inc.'s cable television networks off of most cable systems except during a late night/early morning window of eight hours called the "safe harbor" period. Before Section 505 was implemented in May 1997, a growing number of the more than 500 cable systems that carried one or both of Playboy's networks did so on a 24-hour basis. Trial Tr. 22.¹ After implementation, approximately 70 percent of the systems surveyed by the government had reduced Playboy's networks to the so-called safe harbor hours, J.S. App. 16a-17a,² a time described by one court of appeals as "broadcasting Siberia," when most viewers are asleep.³

Adopted to address an episodic phenomenon known as "signal bleed," Section 505's broad restrictions on protected speech are excessive and its protections are redundant, as the court below found. Numerous non-regulatory options either prevent, or provide cable subscribers with the ability to block, signal bleed

¹All exhibits and testimony referenced throughout this brief are more specifically identified in the attached Addendum. See Appellants' Br. 5 n.1.

²J.S. App. refers to the Appendix attached to the Jurisdictional Statement filed by the Appellants. M.A. App. refers to the Appendix attached to the Motion to Affirm filed by Playboy Entertainment Group, Inc. Although the Solicitor General sought and received Playboy's and the Court's permission to dispense with the preparation of a Joint Appendix, he lodged with the Clerk five videotapes that are part of the record in this case plus a six-page excerpt from Defendants' Post-Trial Brief to the district court. Letter from Seth Waxman to William K. Suter (August 27, 1999). However, the material lodged is neither fully representative of the record below, *see, e.g.*, note 16, *infra*, nor does it represent "generally known facts" that are appropriate for judicial notice. Robert L. Stern, Eugene Gressman, et al., *SUPREME COURT PRACTICE* 556 (7th ed. 1993) ("Stern & Gressman") (citation omitted).

³*Becker v. FCC*, 95 F.3d 75, 82, 84 (D.C. Cir. 1996) (time channeling relegates programming to "broadcasting Siberia," deprives speakers of their "preferred audience" and "inevitably interfere[s] with . . . freedom of expression"). The remaining cable systems were already in compliance without the need to make technical changes. Trial Tr. 37.

from any channel. In addition, less restrictive regulations, including Section 504 of the Telecommunications Act, provide effective alternative solutions for signal bleed. Without regard to such measures, Congress passed Section 505 as a floor amendment the same day that it was offered, without any debate or legislative findings. Purportedly enacted to protect children, Section 505 unnecessarily limits Playboy's right to speak to even the two-thirds of adult households that have no children under 18. J.S. App. 34a. Accordingly, the three-judge district court held correctly that Section 505 violates the First Amendment.

1. Since 1982, Playboy has provided cable operators with adult, sexually-oriented programming on premium networks. J.S. App. 5a, 12a.⁴ Playboy Television is a video version of its namesake magazine. Its format features adult-oriented programming that includes films, short-form videos, live talk shows, and lifestyle programming such as book and movie reviews, news, and music videos. Pl. Ex. 1 at ¶ 10. Playboy Television also offers special-event programming such as Playboy's well-received, four-hour program on AIDS awareness and safe sexual practices done in connection with the World AIDS Day created by the World Health Organization. Trial Tr. 116-117. AdultTVision and Spice offer almost exclusively full-length movies. Pl. Ex. 1 at ¶ 13. Other premium cable networks such as Showtime, HBO, and Cinemax license many of the same programs that are shown on adult-oriented channels, either from Playboy or other independent producers. Pl. Exs. 5, 6; Prelim. Inj. Tr. at 13-14, 39-41.

Like the providers of other premium networks, Playboy fully scrambles the video and audio portions of its programs when it transmits them to cable operators. The operators must descramble

⁴When this litigation began, Playboy provided programming on two networks, Playboy Television and AdultTVision, the latter launched in 1994. Playboy recently acquired Spice Entertainment Companies, Inc. ("Spice") (formerly Graff Pay-Per-View, Inc.), which was a party below in a consolidated action through the preliminary injunction stage. The Spice Hot Network was not purchased by Playboy as part of the transaction. Califa Entertainment Group, Inc. purchased Spice Hot in a separate transaction with Spice.

these transmissions before rescrambling the signal to restrict access to only those customers who have paid for the service. Individual subscribers descramble the premium channel using a set-top box called an addressable converter. A phenomenon known as "signal bleed" may occur when discernible video and/or audio appears on cable customers' televisions although they have not purchased the premium channel or event. The court below described the nature and causes of signal bleed, and found that the "severity of the problem varies from time to time and place to place, depending on the weather, the quality of the equipment, its installation, and maintenance." J.S. App. 9a, 51a.

A variety of non-regulatory means are available to consumers to ensure they do not receive signal bleed. Record evidence demonstrates that cable television converters with "channel mapping" features do not permit signal bleed. J.S. App. 51a. Further, addressable converters typically have built in parental lock-out devices. Pl. Ex. 4. Such converters are routinely used by most multiple system operators ("MSOs"), including Time Warner, TCI, Jones Intercable, and Harron Communications. Pl. Exs. 4, 149, 194, 210. The government's technical expert agreed that many of the most popular configurations for wiring together televisions, VCRs, and cable converters can prevent signal bleed, and instructions for such configurations are provided in product manuals and industry publications.⁵ In addition, the cable industry's leading trade association adopted a policy to resolve signal bleed problems upon request well before passage of the Act.⁶

⁵Jackson Dep. Tr. 135-137, 155-157. The cable industry provides guidance to consumers on such wiring configurations. See Defs. Ex. 83(d) *Connecting Cable Systems to Subscribers' TVs and VCRs - Guidelines for the Cable Industry* by the NCTA Engineering Committee Subcommittee on Consumer Interconnection.

⁶In February 1995, the National Cable Television Association adopted a policy that included voluntary blocking on request plus five other measures to facilitate parental control. Pl. Ex. 1 at ¶ 33; Pl. Ex. 35.

Finally, many televisions and VCRs already have built-in child-lock circuitry that allows parents or others to completely lock out the audio and video of any channel, thereby preventing signal bleed. In a recent survey, 80 percent of more than 100 models of televisions currently being sold by a major electronics store contained built-in child-lock circuitry, which has been available for at least the past several years. Pl. Ex. 62. During this period, more than 70 million new televisions were sold in the United States. Pl. Ex. 62(b).

2. As part of the Act, Congress adopted a number of measures designed to enable parents to protect children from "indecent" or other television programming considered to be objectionable. Section 504 requires cable operators, without an additional charge, to "fully scramble" or otherwise "fully block the audio and video programming" of any channel upon the request of a customer who does not subscribe to the channel. 47 U.S.C. § 560 (Supp. III 1998). Similarly, Section 551, the so-called V-chip provision, requires that new televisions include circuitry to enable parents to block video programs that contain "sexual, violent, or other indecent material about which parents should be informed before it is displayed to children." 47 U.S.C. § 303 note (Supp. III 1998).

Congress also enacted Section 505, the subject of this appeal, which requires that for any channel of service "primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." 47 U.S.C. § 561(a). Any multichannel video programming distributor (referred to generally herein as a "cable operator") that could not meet the "block or scramble" requirements of Section 505(a) within 30 days after the Act was signed was required to cease all programming on the designated channels "during the hours of the day when a significant number of children are likely to view it." 47 U.S.C. § 561(b). The Federal Communications Commission subsequently decided that these blackout hours run from 6 a.m. to 10 p.m. *Implementation of Section 505 of the*

Telecomms. Act of 1996, 11 FCC Rcd. 5386, 5387 (1996) ("Implementation of Section 505").

3. Playboy brought suit in the United States District Court for the District of Delaware seeking injunctive relief and a declaration that Section 505 is unconstitutional. Before Section 505 took effect, Playboy sought and received a temporary restraining order enjoining its implementation and enforcement. M.A. App. 18a-19a. But after a hearing on the motion for a preliminary injunction, the three-judge district court denied Playboy's motion for a preliminary injunction. J.S. App. 40a-86a. The district court said, "[a]t that time, it was not clear what any given MSO, with a system emitting signal bleed, would do when faced with complying with § 505." J.S. App. 16a. The court also noted its uncertainty about how many homes with the "potential" to receive signal bleed in fact receive it, and it asked for "more specific evidence" in subsequent proceedings on the actual extent of signal bleed as well as any evidence of its ill-effects on children. *Id.* at 61a, 72a & n.25, 79a-80a.

After this Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997), but before the hearing on the permanent injunction below, Playboy filed a motion for summary judgment on the question of statutory vagueness. Playboy argued that the vagueness of the indecency standard, coupled with a total absence of relevant FCC precedent, prevented it from providing alternative programming during non-safe harbor hours, thus making Section 505 both uncertain and overbroad. Appellants filed a cross-motion for summary judgment on the same issue. The district court denied both parties' motions, but noted the "fundamental uncertainty" about the definitions in the law and cited the lack of interpretive guidance from the FCC. M.A. App. 25a. Playboy subsequently filed a request for an expedited declaratory ruling with the FCC seeking clarification of Section 505's indecency standard and asking for an advisory opinion with respect to nine programs that, with one exception, Playboy Television had either aired, or

planned to transmit, on its network.⁷ The FCC denied the request, M.A. App. 28a-29a, and provided no further guidance, except to argue at trial that all of the programs submitted to the FCC, including the safe sex documentaries, would be considered indecent if transmitted on Playboy Television. Defs. Post-Trial Br. at 67-69.

The vagueness of the statutory mandate thwarted Playboy's efforts to mitigate Section 505's censorial impact. Ever since Section 505 was adopted, Playboy repeatedly sought clarification from the government⁸ and attempted to modify its programming schedule in order to minimize the law's restrictions and to preserve its access to adult subscribers.⁹ Despite this and other ongoing attempts to understand the meaning and implications of the law, the FCC repeatedly rebuffed Playboy's efforts, applying its "generic" definition of indecency and asserting that no explanation of the terms was needed beyond their plain

⁷Pl. Ex. 118. The request included two safe sex documentaries produced for World AIDS Day (*Doin' it Right* and *Hot, Sexy and Safer*), two critically acclaimed theatrical films (*9-1/2 Weeks* and *The Unbearable Lightness of Being*), two magazine-style Playboy news programs (*360 - Sex in the USA* and *Playboy Late Night*), a recurring program that describes a current issue of *Playboy* magazine and events related to Playboy (*World of Playboy*), a recurring feature on Playboy centerfold models (*Video Playmate Calendar*), and an action-adventure film (*Rambo: First Blood, Part II*). A videotape of each of the programs was provided to the FCC and to the court below. Defs. Exs. 36-43.

⁸See Pl. Ex. 117 (Comments of Playboy Entertainment Group, Inc., *Implementation of Section 505 of the Telecomms. Act of 1996*, CS Dkt. No. 96-40 (Apr. 26, 1996)).

⁹Playboy explored "every option" to retain viewers in the wake of Section 505, Trial Tr. 284-285, including an attempt to selectively reprogram its feed for its largest markets to regain prime time carriage. *Id.* at 114-120, 328-329. Playboy adjusted its satellite feed, attempted to use a masking sound track, and explored additional ways to adjust its programming to comply with Section 505. *Id.* at 123-125 (investigating costs of purchasing or renting a new transponder), 125-129 (describing Playboy's audio-masking feed), 282-284 (exploring the use of digital satellite services such as DirecTV, PrimeStar, and EchoStar to offer different programming during non-safe harbor hours).

meanings.¹⁰ As a result, no cable operators who reduced their hours of operation to comply with Section 505 transmitted any Playboy programming outside the safe harbor hours. Trial Tr. 122.

4. Following an evidentiary hearing on the request for a permanent injunction, the district court held that Section 505 is unconstitutional. J.S. App. 1a-39a. Although the court had been skeptical at the preliminary injunction stage of the potential losses that would be caused by Section 505, it found that the "restrictiveness of § 505 is now evident" given Playboy's experience following the law's implementation. J.S. App. 33a. It noted that neither Playboy nor the government could identify a single cable system that had adopted any approach other than time channeling, and concluded that cable operators had "no practical choice but to curtail such programming" for two-thirds of the broadcast day in all households, whether or not children were present. *Id.* at 16a-17a. It concluded that the time channeling requirement of Section 505 "diminishes Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech." *Id.* at 33a-34a.

The district court also noted that the pervasiveness of signal bleed had not been established. Rather, the court held that the government presented "no evidence on the number of households actually exposed to signal bleed," and instead offered anecdotal evidence comprising "only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting." *Id.* at 11a-12a. It found that the lack of evidence provided by the government at trial "is reflected by the same dearth of evidence of harm within the legislative history of § 505." *Id.* at 29a. While the district court agreed that Section 505 was intended to address a compelling interest, it pointed out that the "mere articulation of a theoretical harm is not enough." *Id.* at 28a.

¹⁰See Pl. Ex. 27 at 14; *Implementation of Section 505*, 11 FCC Rcd. at 5387. The FCC defined "indecent" programming under Section 505 "the same as in other video programming contexts." 11 FCC Rcd. at 5387 & n.13.

Comparing Sections 504 and 505 as alternative ways to deal with signal bleed, the court concluded that "§ 504 is not restrictive of anyone's First Amendment rights and is clearly 'less restrictive'" than Section 505. J.S. App. 34a. Significantly, the court found that "two-thirds of all households in the United States have no children" but that Section 505 applies "irrespective of whether a household has children." *Id.* at 33a-34a. It also held that the content-neutrality of Section 504 made it less restrictive of First Amendment interests than Section 505. Although the Justice Department had submitted evidence that few subscribers had availed themselves of Section 504, the court noted that "the finding of minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." *Id.* at 36a. "Indeed," the court concluded, "the Government has not convinced us that it is a pervasive problem."¹¹ Accordingly, the district court permanently enjoined the government from enforcing Section 505 by its Order dated December 29, 1999.

5. On January 12, 1999, the government filed motions pursuant to Rule 59(e) of the Federal Rules of Civil Procedure seeking to alter or amend the judgment to limit the injunction to Playboy, and Rule 60(a) seeking to correct the judgment by including the "adequate notice" requirement within the mandate. Appellants filed a notice of appeal from the district court's decision and injunction order one week later, on January 19, 1999, while the motions to alter and correct the judgment were still pending. The district court dismissed the Rule 59(e) and 60(a) motions on March 18, 1999, holding that it lacked jurisdiction to consider them. J.S. App. 91a-92a. Appellants filed a further notice of

¹¹J.S. App. 36a. The court found that cable operators communicate the availability of channel blocking through a variety of means, including monthly billing inserts, special mailings, barker channels, and adult channel advertisements, *id.* at 20a, but said that it "is not clear" that such notices of the provisions of Section 504 have been adequate, *id.* at 36a. Accordingly, the court directed Playboy to ensure that cable operators provide their customers with "adequate notice" of Section 504. *Id.* at 38a.

appeal on April 7, 1999, seeking review of both the December 1998 and March 1999 Orders of the district court.

SUMMARY OF THE ARGUMENT

The district court correctly held that Section 505 violates the First Amendment because it significantly restricts protected speech without employing the least restrictive means of regulation and because the government failed to prove that its stated interests are real and not conjectural. Specifically, the district court found that:

- Section 505 imposes a content-based restriction on constitutionally protected speech that effectively imposes a ban on adult cable networks for two-thirds of the broadcast day in the vast majority of cable systems. J.S. App. 33a.
- Although the purpose of Section 505 is solely to protect children, the law significantly restricts speech in all U.S. households, including the two-thirds of all homes that do not have children under 18. J.S. App. 34a.
- The "problem" of signal bleed was never established in the legislative history, which the court below described as "an absolute void." M.A. App. 15a. Nor was the problem demonstrated after two years of litigation involving extensive expert testimony. J.S. App. 11a-12a.
- Less restrictive means are adequate to address the phenomenon of signal bleed. In particular, Section 504 of the Act, which enables any customer to obtain a blocking device for any network without charge, is a content-neutral solution that is tailored to the households that need it. J.S. App. 38a.

In the face of these findings, the government now asks this Court to reverse the decision below by making sweeping changes in its First Amendment jurisprudence to permit a greater "degree of flexibility in governmental regulation." Appellants' Br. 22. Specifically, Appellants ask this Court:

- To apply the standard for the regulation of "indecentcy" on free over-the-air broadcast television to cable television operators despite this Court's recent rejection of the government's effort to apply the broadcast standard to cable leased access channels.
- To approve regulations that would reduce the adult population to only what is fit for a child in most television households for most of the broadcast day in order to serve an "independent interest" in protecting children from indecentcy, even where parents are fully capable of doing so without restricting others' speech.
- To preclude reviewing courts from contemplating potentially less burdensome measures if such alternatives have not already been adopted and litigated, and to subject the government's "predictive judgments" under the least restrictive means test only to rational basis review.

None of the government's arguments for expanding its authority over protected speech has merit.

I. The significant restriction Section 505 imposes on Playboy's speech violates the well-established principle that a governmental interest in preventing access by children to sexually-oriented materials does not justify an unnecessarily broad suppression of speech addressed to adults. The government understands this fact, and even acknowledges that "a similar content-based restriction on non-obscene speech would surely be unconstitutional in many other contexts." Appellants' Br. 19. Yet it would have this Court approve a content-based restriction here by undermining established First Amendment law.

The government's primary argument is to ask this Court to extend the standard applicable to broadcast indecentcy to cable television. But this Court in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) ("*Denver*"), recently refused to do what the government now proposes, and for good reason. Appellants ignore the

historical differences in broadcast and cable regulation, the technical distinctions between the two media and the amplified censorial effect of time channeling in the cable television context. Such regulation has not previously been applied to cable programming, largely because cable allowed individual subscribers through existing technology to exert greater control over programming that comes into the home, where broadcasting did not. In addition, the restriction on speech imposed by time channeling is far greater for cable television because it restricts entire networks, as compared to that for broadcasting, where enforcement affects only the scheduling of a particular program. Because of the inherent vagueness of the indecency standard, aggravated by the particular mandate of Section 505 and the FCC's steadfast refusal to clarify the law, cable operators had no practical choice but to censor all of Playboy's programming during non-safe harbor hours. The government's attempt to extend *Pacifica* to newer media, if successful, would have wide-ranging chilling effects, and would undermine the logic of this Court's recent decision in *Reno v. ACLU*, 521 U.S. 844 (1997).

On the other hand, the district court's decision to strike down Section 505 is fully supported by this Court's decision in *Denver*, regardless of whether the level of review is characterized as strict or intermediate scrutiny. *Denver* upheld only a permissive regulation that expanded cable operators' editorial discretion, while striking down mandatory controls that impeded – but did not ban – adult access to “indecent” speech. The same reasoning compels the conclusion that Section 505 is unconstitutional. Moreover, the record below confirms the government's failure to demonstrate that the recited harms of signal bleed are real and not merely conjectural.

In addition, Section 505 is invalid because it does not provide the least restrictive means of addressing the government's concerns. Section 504 provides a content-neutral alternative that is tailored to those households that actually experience signal bleed, and that the government agrees is effective in stopping the phenomenon when used. Appellants' contentions that too many

parents are “distracted” to make Section 504 an adequate alternative, and that it is somehow inappropriate for a reviewing court to consider “hypothetical” alternative regulations, were considered and rejected by this Court in *Denver*. Moreover, the argument that it is acceptable to censor programming in all households in a community because some parents fail to use readily available measures to protect their children is antithetical to the rule that the government cannot reduce the adult population to viewing only what is fit for a child. The government's further claim that an “enhanced” Section 504 is equally as restrictive as Section 505 overlooks its failure to demonstrate the pervasiveness of signal bleed, and vastly overstates the cost of compliance with Section 504. Section 505 is inherently more restrictive in a constitutional sense because it is content-based and indiscriminately restricts speech in all households. In any event, the real question is not whether Section 504 may be more restrictive than Section 505; it is whether Section 504, standing alone, is more restrictive than Sections 504 and 505 together.

II. The district court correctly held that it lacked jurisdiction to consider the government's post-trial motions to modify the judgment because the filing of the notice of appeal terminated the lower court's jurisdiction. The government was not required to file its notice of appeal while its post-trial motions were pending, but its decision to do so carries jurisdictional consequences. Where, as here, the post-trial motions go to the heart of the constitutional controversy, it would be improper for the district court to retain jurisdiction after the appeal is noticed. The government's complaint about an ambiguity in this Court's appellate rules does not justify reversing the decision below, and would be more effectively addressed by asking this Court to modify its rules.

ARGUMENT

I. SECTION 505 VIOLATES THE FIRST AMENDMENT

A. As Playboy Predicted, Enforcement of Section 505 Significantly Restricted the Availability of Its Programming to Adult Viewers

Despite its initial uncertainty about the censorial impact of Section 505, after the trial on the merits the district court found that "[t]he restrictiveness of § 505 is now evident." J.S. App. 33a. As Playboy had predicted, "the practical impact of § 505 [was] to reduce the broadcast day for sexually explicit programming to an eight-hour safe harbor period of 10:00 p.m. to 6:00 a.m." J.S. App. at 17a & n.14. The evidence showed that the system-wide technical requirements of Section 505(a) were impractical.¹² Accordingly, the district court found that "most MSOs ha[d] no practical choice" but to time channel under Section 505(b) and thereby "curtail such programming during the other sixteen hours or risk the penalties imposed by the [law] if any audio or video signal bleed occurs during these times."¹³

As the district court found, these widespread cutbacks significantly "diminishe[d] Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech" because time channeling results in "the removal of all sexually

¹²The district court found that such measures would have required operators to "overhaul[] the[ir] transmission[s] * * * such as through a systematic switch to digital transmission, or by providing channel-mapping converter boxes to all subscribers" to achieve "system-wide blocking." J.S. App. 33a n.23. Such solutions, which would cost in excess of \$1 billion, are not economically feasible to implement Section 505. Pl. Ex. 60.

¹³J.S. App. 17a (emphasis added). Cable operators are extremely unlikely to take any chances with possible allegations of noncompliance since the Communications Act contains criminal penalties for willful violations. 47 U.S.C. § 501. Particularly relevant here, the Justice Department has in the past subjected a complaint about "incompletely scrambled indecent or obscene material" to criminal investigation by both the Criminal Division and the FBI. Pl. Ex. 245.

explicit programming at issue during two-thirds of the broadcast day from all households on a cable system." J.S. App. 33a. Before Section 505 was adopted, the buy rate for Playboy TV increased by an average of 40 percent in cable systems that expanded service from 10 to 24 hours per day. See Pl. Ex. 1 ¶ 26. The overall buy rate for Playboy, which had been growing during the 18 months before the law was adopted, significantly declined after Section 505 was implemented. Trial Tr. 26-28. Consistent with this experience, the court found the restriction imposed by the law was extensive since "30-50% of all adult programming is viewed by households prior to 10 p.m." J.S. App. 33a. The across-the-board cutbacks imposed by Section 505 are particularly excessive because they apply "irrespective of whether a household has children," and because the district court found that "two-thirds of all households in the United States have no children." *Id.* at 34a.

The government's current argument that the burden on speech "is not great," Appellants' Br. 24, is nothing more than an attempt to describe the video bookshelf as half full, rather than half empty. Its offhand defense that "one half or more of appellee's viewers watch during the safe harbor hours anyway" treats cavalierly the district court's finding that, as a general rule, up to 50 percent of Playboy's viewers are affected by time channeling, and ignores entirely the fact that, in some communities, the number exceeds 50 percent.¹⁴ The government's attempt to minimize the impact by suggesting that the average pay-per-view customer purchases programming only five times per year fails to disclose that nearly 25 percent of all cable addressable households are purchasers of adult programming. Pl. Ex. 219. And its argument that subscribers may use their VCRs to tape programming and watch it "whenever they wish," Appellants' Br. 28, does not take into account the impulse nature of pay-per-view purchases or explain the actual

¹⁴When service hours for Spice were reduced to the safe harbor hours in San Diego, for example, the buy rate plummeted by almost two-thirds. Trial Tr. 42-44; see also Pl. Ex. 4 (Harron Communications estimated losses of from 50 to 56 percent due to time channeling).

loss of viewing opportunities that occurred during the enforcement of Section 505.¹⁵ Based on this experience, Playboy estimated that it would lose approximately \$25 million in revenues. Trial Tr. 174. This loss provides one quantitative measure of the lost First Amendment opportunities caused by Section 505.

These restrictions on speech are especially broad in relation to the problem the government is seeking to address. Television may be considered a "pervasive" medium, but the government never demonstrated that signal bleed is a pervasive problem. J.S. App. 36a. The extent to which any particular household may experience signal bleed varies significantly from one cable system to another, and even from household to household within a system. J.S. App. 9a, 51a. Yet the government failed either to quantify the extent of the problem or even to portray accurately its qualitative variations.¹⁶ Even in cable systems that may be susceptible to signal bleed, the industry has responded with a variety of market-based non-regulatory solutions, including channel mapping converters, wiring configurations to prevent

¹⁵Nearly 90 percent of pay-per-view purchases of adult programming are made on impulse. Pl. Ex. 225; Trial Tr. 30. As a result, notwithstanding the existence of VCRs in most homes, Playboy's buy rate declined significantly when Section 505 was in effect.

¹⁶As the record demonstrates, not all signal bleed is created equal. The government's expert on the psychological impact of signal bleed agreed that any harmful effects from exposure would depend on the degree to which images and sounds were understandable. Benedek Dep. Tr. 201. Yet that expert based her entire assessment of the nature and impact of signal bleed on a single exhibit – Defendants' Exhibit 1 – handpicked by government lawyers and which lasted a total of 3 minutes, 44 seconds. Trial Tr. 551. However, when she was shown the other examples of signal bleed in the record – Defendants' Exhibits 3 and 4 – Dr. Benedek did not perceive any problems. After viewing Defendants' Exhibit 4, she testified that she could not tell whether it depicted sexual activity at all and there was no sound that a child could consider unpleasant. *Id.* at 555. Similarly, upon viewing Defendants' Exhibit 3, Dr. Benedek acknowledged that she could not discern what actions were taking place and that she had no idea how a child might interpret the signal. *Id.* She could detect no profanity on either tape. *Id.* at 556. Here, just as it did in the court below, the government sought to define the nature of signal bleed by lodging only Exhibit 1 with this Court, but not Exhibits 3 or 4.

signal bleed, and responsive industry policies. In addition, many televisions and VCRs already have built-in child-lock circuitry that, according to the government's own experts, allows parents or others to lock out the audio and video of any channel, thereby preventing signal bleed. Jackson Dep. Tr. 135-137, 155-157.

The government seeks to discount the impact of such technical measures, and asserts erroneously that the district court relied only on Section 504, "rather than any of those methods, as a less restrictive alternative to Section 505." Appellants' Br. 35 n.25. But such technical solutions are not "regulatory measures." Rather, the district court pointed out that the Appellants' failure to account for market-based solutions was "an underlying problem with the Government's analysis" and, as a result, "the Government presented no evidence on the number of households actually exposed to signal bleed and thus has not quantified the actual extent of the problem of signal bleed." J.S. App. 11a. Thus, after two years of litigation involving extensive discovery and two full hearings with extensive expert testimony, the district court concluded that "the Government has not convinced us that [signal bleed] is a pervasive problem." *Id.* at 36a.

Finally, to whatever extent signal bleed is a current problem, the government agrees that it will be eliminated by the transition to more technically sophisticated delivery systems, including digital transmission. Although the transition will not occur in time to prevent the significant First Amendment loss to Playboy and its subscribers as found by the district court, J.S. App. 18a & n.17, both sides agree that Section 505 eventually will be rendered entirely unnecessary by the unregulated evolution of the cable industry.¹⁷ Nevertheless, Section 505 imposes a widespread restriction on speech to address a problem that is far from universal and that will vanish over time.

¹⁷Playboy agrees with the government that signal bleed does not occur in totally digital systems, but notes the district court's finding that a "considerable percentage of cable systems will remain 'analog only' over the next ten years." J.S. App. 18a n.17.

B. Section 505's Restrictions on Playboy's Programming Violate the First Amendment

The broad restrictions of Section 505 are plainly inconsistent with this Court's decisions that non-obscene sexual expression is protected by the First Amendment and the governmental interest in preventing access by children to such materials "does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno v. ACLU*, 521 U.S. at 874-875; *Denver*, 518 U.S. at 754-756. Although the government asserts that restricting communication between adults "may be constitutional if necessary to serve the compelling interest in protecting minors," Appellants' Br. 25, no precedents support the wholesale cutbacks associated with Section 505.

In the various contexts in which the government regulates access to sexually-oriented materials, courts have upheld only those laws that impose "a relatively light burden."¹⁸ Thus, in a bookstore, the government may require posting and enforcing a store policy that keeps minors from openly reading adult materials, or keeping such materials on a shelf "within sight of the bookseller," *American Booksellers Ass'n*, 372 S.E.2d at 625, but is precluded from imposing more onerous business regulations, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), such as limits on the amount of floor space that can be occupied by adult materials, e.g., *U.S. Sound & Serv., Inc. v. Township of Brick*, 126 F.3d 555, 560 (3d Cir. 1997). Similarly, with adult telephone services, courts have upheld such measures as requiring adults to use a credit card to obtain access,¹⁹ but have rejected regulations

¹⁸*Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 625 (Va. 1988); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 388-389 (1988).

¹⁹*Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129-130 (1989) (government must employ least restrictive means). Thus, where FCC rules block in advance access to a "dial-a-porn" service if it is billed by the telephone company, immediate access is permitted by credit card. *Information Providers' Coalition for Defense of First Amendment v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991); see also *id.* at 878 ("[r]eceipt of uttered expression is provided immediately upon request"); *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d

that imposed more burdensome restrictions that would "act as a deterrent" to potential callers who might use the service "on impulse" or "infrequently."²⁰ And in the context presented here, cable television, this Court has upheld "permissive" regulations that expanded the editorial control of cable operators, *Denver*, 518 U.S. at 750 (plurality op.), but struck down mandatory controls that added "costs and burdens" for the operators, thus "prevent[ing] programmers from broadcasting to viewers who select programs day by day (or, through 'surfing,' minute by minute)," and restricting "viewers who would like occasionally to watch a few, but not many, of the programs on the 'patently offensive' channel." *Id.* at 754.

None of the cases support the type of broad restrictions on speech found to have resulted from Section 505. This is true despite the government's claim that Section 505 is not directed at "the speech itself," but at a "byproduct" or "secondary effect" of speech. Appellants' Br. 22-23. The district court fully considered this argument at each stage of the litigation below, and found that full First Amendment scrutiny applies to Section 505 because it targets channels solely on the basis of their content. J.S. App. 25a ("Signal bleed from the Disney Channel, for example, does not come within the purview of the statute.").²¹

1535, 1543 (2d Cir. 1991) (rules impose "no restraint of any kind on adults who seek access").

²⁰*Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 786-787 (3d Cir. 1990); *Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 855-857 (2d Cir. 1986) ("*Carlin II*"); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121-122 (2d Cir. 1984) ("*Carlin I*") (dial-a-porn rules including "safe harbor" provision struck down).

²¹The government continues to rely on the district court's brief reference to "secondary effects" from the preliminary injunction decision, see Appellants' Br. 22-23, while ignoring entirely the Court's more complete discussion of the issue after all of the evidence was presented. J.S. App. 24a-25a. While the government understandably might prefer the outcome at the earlier stage of the proceedings where it prevailed, its persistence in relying on preliminary findings is at odds with its prior representation to this Court that further findings at the permanent injunction stage would enable the district court to better evaluate the merits of the

This Court repeatedly has rejected similar efforts to mischaracterize direct restrictions on speech as regulations of "secondary effects." See *Reno v. ACLU*, 521 U.S. at 867 (rejecting government characterization of speech regulations as "cyberzoning" subject to "secondary effects" analysis under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50 (1986)); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("Regulations that focus on the direct impact of speech on its audience * * * are not the type of 'secondary effects' we referred to in *Renton*."). It is settled law that the First Amendment prevents the government from restricting the circulation of speech simply because its "byproducts" can cause some type of "nuisance." See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) (possibility of littering does not justify restriction on the distribution of handbills). This is particularly true where, as here, the intensity of the regulation is inextricably bound to speech content. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (government cannot impose variable financial burden on public demonstration based on evaluation of threatening content). For example, the government could not regulate sound levels at an outdoor concert based upon its distaste for a particular type of music. *Ward v. Rock Against Racism*, 491 U.S. 781, 791-793, 795 & n.5 (1989). Nor can it impose a content-based regulation of signal bleed and be immune from traditional First Amendment scrutiny.

This Court's decision in *Erznoznik v. City of Jacksonville* 422 U.S. 205 (1975) is directly on point. There, this Court struck down a local ordinance designed to protect children from "fleeting * * * glimpses of nudity" that could be seen from public streets when X-rated movies were shown at drive-in theaters. *Id.* at 214-215. Like Section 505, the ordinance at issue in *Erznoznik* targeted inadvertent viewing of bits and pieces of movies, and it subjected drive-in owners to essentially the same dilemma created

case. Mot. to Affirm at 12, 14-16, *Playboy Entertainment Group, Inc. v. United States*, No. 96-1034 (U.S. 1997).

for cable operators here: "they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Id.* at 217. This Court held that the law imposed too great a burden under the First Amendment because it would "increase the cost of showing films containing nudity."²² Such a burden, the Court concluded, is an unconstitutional "restraint on free expression" even if "it might not result in total suppression of these movies." *Id.* at 211 n.8; see also *Rabe v. Washington*, 405 U.S. 313, 314 (1972) (*per curiam*) (striking down ordinance restricting drive-in that presented films with "sexually frank scenes" that were clearly visible from private residences). Rather, the regulation was found to be excessive because it created a "deterrent effect" on speech. *Erznoznik*, 422 U.S. at 217.

In short, this Court has never upheld the types of broad restrictions on speech that are associated with Section 505. The government understands this fact, and even acknowledges that "a similar content-based restriction on non-obscene speech would surely be unconstitutional in many other contexts." Appellants' Br. 19. Accordingly, Appellants ask this Court to eviscerate the applicable level of First Amendment scrutiny in order to overturn the decision below. But as explained herein, it cannot justify such a sweeping change in the law.

²²*Id.* at 211. The government does not dispute the relevance of *Erznoznik*, but attempts instead to distinguish the Jacksonville ordinance by claiming that it applied to a broader category of speech than does Section 505. But the claim that Section 505 "is directed solely at sexually explicit programs broadcast on sexually explicit programming services," Appellants' Br. 23 n.14, is undermined by the actual language of Section 505 ("channels primarily dedicated to sexually-oriented programming") as well as the imprecision and vagueness of the indecency standard. See *infra* pp. 26-30. Moreover, a contemporaneous reference to *Erznoznik* written by the Meese Commission's legal expert described the Jacksonville ordinance as a "requirement that drive-in theaters 'shield' passersby from adult or X-rated movies but not from others." See Frederick F. Schauer, *THE LAW OF OBSCENITY* 94-95 (BNA 1976).

1. *Pacifica* Does Not Provide the Appropriate Standard of Review

The heart of the government's argument is to ask this Court to do precisely what it refused to do in *Denver* — to extend the standard applicable to broadcast indecency to cable television. Although the *Denver* plurality compared broadcasting and cable television and found that both media are "pervasive," 518 U.S. at 744-745, it expressly declined the government's invitation to apply the holding from *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to cable television.²³ Here, the government asks this Court to consider the "all-important context" and to apply *Pacifica* directly to cable, yet it utterly ignores the historical differences in broadcast and cable regulation, the technical distinctions between the two media, and the amplified censorial effect of time channeling in the cable context. As this Court explained in *Reno v. ACLU*, *Pacifica* involved a single order issued by the FCC which "had been regulating radio stations for decades," and "targeted a specific broadcast" that "represented a rather dramatic departure from traditional program content." 521 U.S. at 867. This case, however, arises in a very different context.

a. Contrary to the government's assertions, *Pacifica* is a most limited holding. This Court upheld only the government's ability to subject a particular broadcast to subsequent review, and emphatically declined to authorize the FCC "to edit proposed broadcasts in advance and to excise material considered

²³*Denver*, 518 U.S. at 755 (plurality op.). The government's startling assertion that "[n]one of the opinions in *Denver Area* suggested that regulation of indecency on cable television should be analyzed under a standard that differs in any way from the standards governing regulation of indecency on over-the-air broadcast television and radio," Appellants' Br. 20, is contradicted on the same page of its own brief, *id.* at 20 n.10 (discussing Justice Kennedy's endorsement of strict scrutiny standard), and by the various *Denver* opinions, e.g., 518 U.S. at 803-804 (Kennedy, J., concurring in part, dissenting in part) (concerns articulated in *Pacifica* "do not justify . . . a blanket rule of lesser protection for indecent speech"), 812-819 (Thomas, J., concurring in judgment in part and dissenting in part) (discussing application of full First Amendment protection to cable television).

inappropriate for the airwaves." 438 U.S. at 735-738. The ruling applied only to the "specific factual context" presented by the FCC's order — whether the Commission had the authority "to proscribe this particular broadcast," *id.* at 742 (internal quotation marks omitted), and this Court expressly limited its holding to approve only the "subsequent review" of the particular words at issue. *Id.* at 737.

Applying the *Pacifica* standard to cable television would drastically increase the level of government regulation of this medium, which has never previously been subject to the same degree of FCC control as broadcasting.²⁴ Whereas *Pacifica* involved programming that represented "a dramatic departure from traditional program content," applying broadcast-type indecency rules to cable television would extend regulation of programming to content that has always been available on this medium.²⁵ Traditional cable television fare is even more distinguishable from broadcast content because of the existence of government-mandated leased and public access channels, which may present indecent material to all cable subscribers on the basic

²⁴See, e.g., *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1116 (D. Utah 1985) (cable indecency law targeting premium movie services invalidated), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415, 1419 n.4 (11th Cir. 1985) (same).

²⁵Final Report, The Attorney General's Commission on Pornography 282 (1986) ("MEESE COMMISSION REPORT") (the increased sexual explicitness of cable television compared to broadcasting occurs in talk shows, call-in shows specializing in sexual advice, music videos featuring strong sexual or violent themes, cable channels that specialize in sexual fare, and more general purpose cable channels that offer uncut motion pictures that would not be shown on broadcast television). In one review of over 1,300 movies during a three year period, the FCC found that more than half of the films on general premium cable services received an MPAA R rating. *Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5308-5309 (1990). Although the R rating obviously is not a legal standard, the FCC has used it as a general rule of thumb. See *id.* ("adults can obtain indecent material through cable television" because "a significant number of R-rated movies are shown on cable").

service tier.²⁶ Consequently, *Pacifica*-style regulation is far more restrictive (and, as explained below, less effective) when applied to the cable television medium.²⁷

In seeking to apply *Pacifica* wholesale to cable television, the government also ignores important technical distinctions between the broadcast and cable media. The broadcasting "safe harbor" rules historically were based on the fact that blocking technology did not exist for radio or for free television.²⁸ As the Solicitor General told this Court in *Denver*, Congress employed a safe harbor approach for broadcasting "because it is technologically impracticable (at least at present) to implement a central office 'blocking' scheme to screen indecent programming on existing television sets and radios." Brief of Fed. Resp'ts at 40 n.20, *Denver*. Accordingly, any First Amendment burdens resulting from the broadcasting safe harbor were more easily justified in that specific context because there was no other way to address the government's concern.²⁹

²⁶*Denver*, 518 U.S. at 752-753; *Loce v. Time Warner Entertainment*, 1999 WL 387150, at *8 (2d Cir. June 14, 1999); *Goldstein v. Manhattan Cable Television, Inc.*, 916 F. Supp. 262, 267 (S.D.N.Y. 1995).

²⁷Because sexually-oriented material can and does appear on a broad range of cable networks, Section 505 also violates the Equal Protection Clause of the Fifth Amendment. See *Action for Children's Television v. FCC*, 58 F.3d 654, 668-669 (D.C. Cir. 1995) (en banc) (invalidating different safe harbor hours for public broadcasters), cert. denied, 516 U.S. 1043 (1996). Playboy raised this issue with the court below. See Pl. Post-Trial Br. at 74-77.

²⁸See *Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5309 (separating children from adults in the broadcast audience is an "impossibility"), id. at 5305 ("parents' control of children's television viewing . . . differs from parental control of cable viewing"), at 5308 ("[w]hile signal blocking and subcarrier use appear to be technologically feasible to prevent reception by individuals not wishing to receive certain signals, neither is available today" for broadcasting); see *Denver*, 518 U.S. at 775 (Souter, J., concurring) ("broadcasts [are] . . . difficult or impossible to control without immediate supervision").

²⁹By increasing parental control over broadcasting, the V-chip requirements of the Telecommunications Act may now eliminate this rationale for applying time channeling restrictions on free over-the-air television.

With cable television, however, reviewing courts, including this Court, have noted that various technical options are available to permit control of cable programming into the home. *Denver*, 518 U.S. at 755-757 (discussing less restrictive technical alternatives, including the possibility of adding informational requirements); *Cruz*, 755 F.2d at 1420-21 (discussing lockboxes). Ironically, the government previously has taken the position that such technical options are less restrictive than time channeling. Brief of Fed. Resp'ts at 40-41, *Denver* (noting relative First Amendment burdens "[w]here technology permits a choice between mandatory time-of-day restrictions and a technique that permits 24-hour access").

b. Unlike the single enforcement order at issue in *Pacifica* that "targeted a specific broadcast," *Reno*, 521 U.S. at 867, Section 505 targets "channels" for wholesale service cutbacks. When safe harbor rules are applied to broadcasters, the affected station may comply by rescheduling a particular program to late night hours. But here, the district court found that the affected networks had "no practical choice" but to go dark for 16 hours per day. J.S. App. 17a. This is a fundamental breach of the basic principle that "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . ."³⁰ A blanket rule "chills potential speech before it happens" and imposes a far greater First Amendment burden than "an isolated disciplinary action." *United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995).

The government asserts, however, that Section 505 requires time channeling or blocking "only of indecent material" and that the fact that Playboy's programming is restricted for two-thirds of the broadcast day "is the result of appellee's choice to broadcast only indecent material." Br. in Opp. to Mot. to Affirm at 3-4. This

³⁰*Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 683 (1994) (O'Connor, J., concurring in part and dissenting in part) (citation omitted) ("*Turner I*"); see *Wilkinson*, 611 F. Supp. at 1110 (impact of indecency time channeling is far more burdensome for cable network than for broadcast station).

facile argument ignores the fact that, unlike broadcasting, cable television networks generally are offered as niche services defined by subject matter, and it highlights a fundamental flaw in Section 505 – the presumption it creates that all programming on a “sexually-oriented” channel is necessarily “indecent.” As demonstrated throughout this litigation, this broad supposition, coupled with the lack of precision of the indecency standard, leads to the censorship of programming that clearly is not indecent, and precludes any attempt by Playboy to minimize the censorial effect of time channeling.

As Playboy demonstrated below,³¹ the indecency standard used in Section 505 suffers from the same infirmities identified by this Court in *Reno v. ACLU*. In *Reno*, the identical indecency standard that is now employed in Section 505 was found to be seriously deficient due to “the absence of a definition of either [statutory] term,” the lack of any requirement that the proscribed material be “specifically defined by the applicable * * * law” or that the material be without “serious literary, artistic, political, or scientific value.”³² This Court was troubled by the scope of the indecency restriction because it applied to “any of the seven ‘dirty words’ used in the *Pacifica* monologue” and could also extend to discussions about “safe sexual practices [and] artistic images that include nude subjects.”³³

³¹ See Playboy’s Mot. for Summ. J. on Vagueness at 4-19; Playboy’s Post-Trial Br. at 34-52.

³² 521 U.S. at 871-873 (internal quotation marks omitted). This Court pointed out that the term indecent “does not benefit from any textual embellishment at all,” and the term patently offensive “is qualified only to the extent that it involves ‘sexual or excretory activities or organs’ taken ‘in context’ and ‘measured by contemporary community standards.’” *Id.* at 871 & n.35 (citations omitted).

³³ 521 U.S. at 878. This Court also found that a speaker could not confidently assume “that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the [law].” *Id.* at 871.

Section 505 has the same flaws, plus a few more. After briefing and argument on the vagueness issue, the district court below reserved judgment, but noted its particular concern “about the uncertainty which continues to surround the restrictions on programming on channels primarily dedicated to sexually-oriented programming during the non-safe harbor hours, presently the hours from 6:00 a.m. to 10:00 p.m.” M.A. App. 24a. It also pointed to the “fundamental uncertainty surrounding the question of how a channel primarily dedicated to sexually-oriented programming during safe harbor hours would be classified if it opted to air an alternative type of programming during non-safe harbor hours.” *Id.* at 25a. In particular, the district court asked whether there are “any FCC letter or advisory opinions that are available to assist this Court, the plaintiff, or other channels * * * in construing the permissible scope of regulation under Section 505.” *Id.* at 25a n.6.

Notwithstanding the district court’s concerns, the FCC rejected Playboy’s efforts to get specific guidance on the meaning of the indecency standard in Section 505. It rejected Playboy’s request for clarification, including a request for an expedited ruling to clarify the status of a safe sex documentary that premiered on World AIDS Day in December 1997.³⁴ In a one-page letter, issued long after World AIDS Day came and went, the Chief of the Cable Services Bureau wrote that “declaratory rulings related to programming issues must be dealt with cautiously” and “have the potential to be viewed as prior restraints.” M.A. App. 28a-29a.

Notwithstanding the FCC’s professed caution, the government in the court below did not hesitate to declare all of Playboy’s

³⁴ Along with its request for a declaratory ruling on nine videos, Playboy sought an expedited ruling for the safe sex program *Doin’ it Right* in the hope of transmitting it outside the safe harbor hours to make it available to as many cable subscribers as possible. When no ruling was forthcoming, however, the program aired after 10 p.m. Trial Tr. 117-118.

programming to be "indecent."³⁵ In particular, the government argued that AIDS awareness programs on Playboy TV should be restricted because they contained "crude and explicit language" and some "explicit" demonstrations. Defs. Post-Trial Br. at 68-69. It also argued that news magazine-type programs should be restricted because they generally are sexually-oriented, use some of George Carlin's "filthy words" in some segments, and include some segments with sexual activity. *Id.* at 67-68. And the government argued that nude images in the *Video Playmate Calendar* are indecent despite the absence of any sexual activity. *Id.* at 68.

In short, the government's actions in this case substantiate this Court's concerns that the indecency standard fails to account for the merit of a particular program and does not consider the work as a whole. In *Reno*, for example, this Court noted that a vague indecency standard threatened to restrict safer sex instructions "written in street language so that the teenage receiver can understand them," 521 U.S. at 870-871, 878, which is exactly what occurred here.³⁶ Similarly, the government's willingness to condemn news programs that included intermittent, fleeting images of sexual activity or profanity confirmed its failure to consider the work as a whole.³⁷ And its tendency to equate "nudity" with "indecency" undermines its argument that Section 505 is narrowly focused on "sexually explicit programs" and is

³⁵ *Amici* Family Research Council, et al., embrace the government's position and state that Section 505 should restrict Playboy's speech "regardless of whether the 'sexually explicit' material is medical, scientific, critically important, or mere entertainment in nature." Brief of *Amici* Family Research Council, et al., at 5.

³⁶ Contrary to the government's refusal to issue a declaratory ruling and its claims that Playboy's AIDS education programs should be considered indecent under Section 505, the First Circuit held that Playboy's program *Hot, Sexy and Safer* was appropriate for a mandatory middle school assembly because it was "intended to educate the students about the AIDS virus." *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 541 (1st Cir. 1995).

³⁷ See, e.g., Defs. Ex. 41 (*World of Playboy*, in which only two of twelve news segments had any depictions of sexual activity).

contrary to well established law.³⁸ Finally, the government's discussion of the theatrical features contained in Playboy's declaratory ruling request underscores the concerns raised by the district court in *Reno* that the indecency standard restricts "a broad range of material" including "contemporary films" such as "*Leaving Las Vegas*."³⁹

Although the district court did not resolve the vagueness issue, J.S. App. 23a, 39a, it implicitly rejected the government's claim that "Playboy can offer non-indecency programs 'in the clear' whenever it wishes during the non-safe harbor period." Reply Br. in Support of Defs.' Mot. for Partial Summ. J. at 12. The court found that cable operators have "no practical choice" under Section 505 but to censor Playboy TV for two-thirds of the broadcast day, J.S. App. 17a, and that "the MSOs have unanimously chosen to stop *all* such programming on dedicated adult channels during the non-safe harbor hours." *Id.* at 33a n.23 (emphasis added). This finding undercuts the government's claim that time channeling is no more restrictive in this context than when it is applied to broadcast stations. And it also provides an

³⁸ *Erznoznik*, 422 U.S. at 213; *American Booksellers Ass'n*, 484 U.S. at 394; see also *ACLU v. Reno*, 24 Media L. Rep. (BNA) 1795, 1796-1797 & n.3 (E.D. Pa. May 15, 1996) (admonishing Justice Department for investigation of "centerfold-type images"). In contrast to the government's position here, the Department of Defense found that some of the same types of Playboy videos that were submitted to the FCC are not "sexually explicit" within the meaning of The Military Honor and Decency Act, 10 U.S.C. § 2489a (Supp. III 1998). It found that such videos as *Playboy 1995 Playmate Calendar* and various *Playboy Video Centerfolds* are not "sexually explicit." Twelve copies of the Pentagon's list of findings has been lodged with the Clerk of this Court.

³⁹ *ACLU v. Reno*, 929 F. Supp. 824, 855 (E.D. Pa. 1996) (Sloviter, J.). Although the government below argued that the theatrical releases included in Playboy's declaratory ruling request such as *9 1/2 Weeks* and the *Unbearable Lightness of Being* are not "typical or frequent fare" for Playboy, Defs. Post-Trial Br. at 68, such films have aired on Playboy TV and are sufficiently "typical" that Playboy uses *9 1/2 Weeks* as an example in its editorial guidelines. See Pl. Ex. 132. Of course, such programming can never become more typical or frequent under Section 505's vague standard.

independent basis for this Court to conclude that Section 505 is unconstitutional.⁴⁰

c. The government's assertion that the context of Section 505 provides an even greater justification for "flexibility in regulation," Appellants' Br. 22, is wrong both factually and as a matter of law. The claim that Section 505 is less restrictive than time channeling under *Pacifica* because cable operators may transmit adult programming "at any time of the day or night" with adequate scrambling simply is incorrect. Appellants' Br. 23-24. Broadcasters have exactly the same "option" as cable operators. Under the FCC's indecency rules, broadcast stations may transmit indecent programming during non-safe harbor hours "on encrypted services, such as subscription television" ("STV").⁴¹ However, STV is not an economically viable alternative means of complying with indecency rules, and it would be frivolous to suggest that any burdens on broadcast speech imposed by the rules could be avoided by switching to a subscription format.⁴² Likewise, the district court found that the system-wide scrambling alternative provided by Section 505(a) was not viable, and that "[n]either Playboy nor the government could identify a single

⁴⁰The question of Section 505's facial invalidity on grounds of overbreadth or vagueness is "fairly included" within the questions presented in this appeal. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992); see Appellants' Br. at I. Moreover, this Court may uphold a judgment on any ground raised in the court below "whether or not that ground was relied upon, rejected, or even considered by the District Court or Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

⁴¹*Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5308. Contrary to the government's suggestion, in fact, Section 505 is more restrictive for cable operators with respect to scrambling because its requirements extend only to "multichannel video programming distributor[s]." 47 U.S.C. § 561(a). No comparable rule applies to STV.

⁴²STV has been a marketplace failure. At its peak, around 1982, the service had about 1.4 million subscribers, and its numbers steeply declined thereafter. BROADCASTING & CABLE YEARBOOK 1998, at xxviii. The current BROADCASTING & CABLE YEARBOOK lists no subscription operations among U.S. television stations. See *id.* § B.

cable system that had adopted double scrambling to comply with § 505." J.S. App. 16a-17a, 33a n.23. It is therefore incorrect to suggest that the possibility of scrambling lightens the load of Section 505.⁴³

Nor is there any basis in the record for the government's claim that the risks to children posed by signal bleed from Playboy's programming "are substantially greater than those present in *Pacifica*." Appellants' Br. 25. This argument, which depends on an overly generalized characterization of the programming at issue, overlooks the fact that the government failed to demonstrate that signal bleed is a "pervasive problem," J.S. App. 36a, either quantitatively or qualitatively. The district court noted the lack of evidence that "the effects of viewing signal bleed of sexually explicit television are the same as viewing sexually explicit television outright." J.S. App. 29a. In this regard, the FCC has suggested that concern over indecency is not present where the sexual import of material is "barely intelligible, much less inescapable to adults" so that those who randomly tune in would be unlikely to "continue listening" or unlikely to "discern the [material's] sexual meaning." *Sagittarius Broad. Corp.*, 7 FCC Rcd. 6873, 6874 (1992).

Even where signal bleed is more discernible, there is no record support for the government's assertion that the "sound tracks from appellee's programming alone are much coarser and far more offensive than the broadcast that was at issue in *Pacifica*." Appellants' Br. 30. With respect to the government's references to "assorted orgiastic moans and groans," Appellants' Br. 6 n.4, Judge Farnan described such audio signal bleed as "akin to the

⁴³The fact that certain cable operators already comply with the technical requirements of Section 505(a) does nothing to reduce the regulatory burden of the law, because those operators did not upgrade their systems to comply with government mandates. However, the government's suggestion of a forced migration of Playboy programming to a digital tier by operators who have commenced some digital service, Appellants' Br. 40-41, would significantly restrict the number of subscribers who could receive service for a number of years. Trial Tr. 166-167.

utterances of actress Meg Ryan during her performance in the diner scene in the movie *When Harry Met Sally*,” M.A. App. 17a n.11, and even the government’s expert witness testified that such sounds were no more “offensive” or “harmful” than sounds routinely emitted from other channels.⁴⁴ Nor is there any evidence in the record that the sound tracks of films routinely shown on other premium networks (that are not subject to Section 505) are any less “coarse” or “offensive.” See Pl. Ex. 18 at 2 (HBO film *Another 48 Hours* averages a profanity every 30 seconds).

Finally, it should be noted that granting the government’s request to apply *Pacifica* here would violate the *Denver* plurality’s decision to eschew adopting “a rigid single standard, good for now and for all future media and purposes.” 518 U.S. at 742 (plurality op.). The government is using this case as a vehicle to obtain “greater flexibility” to regulate protected speech in the cable television medium, a request that has far-reaching implications as some courts have begun to define high-speed Internet access as a cable television service, regulated under the Cable Act. See *AT&T Corp. v. City of Portland*, 43 F. Supp.2d 1146 (D. Ore. 1999), appeal pending, No. 99-35609 (9th Cir.). As Justice Souter wrote in *Denver*, the media of communication are becoming “less categorical and more protean,” and “as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.” *Denver*, 518 U.S. at 776-777 (Souter, J., concurring). Here, the government’s request that this Court expand *Pacifica*’s holding to newer media in circumstances far beyond its original context threatens to undermine the logic of *Reno v. ACLU*, 521 U.S. at 870 (“our cases provide no basis for

⁴⁴The government’s expert testified that any adverse effect of audio signal bleed is based on a child’s exposure to an “unpleasant sound,” not to anything related to sexuality. The sound could be an explosion, a gunshot, or a scream, and it would not matter what channel is on television. Trial Tr. 578-579.

qualifying the level of First Amendment scrutiny that should be applied to this medium”), and should be firmly rejected.

2. Section 505 is Unconstitutional Under the Level of Scrutiny This Court Applied in *Denver*

The district court correctly found Section 505 to be unconstitutional under the teachings of *Denver*, regardless of whether the First Amendment standard applied there is characterized as intermediate scrutiny or “strict scrutiny or something very close to strict scrutiny.”⁴⁵ There simply is no basis for the government’s complaint that the district court applied a “particularly rigorous” form of strict scrutiny. Appellants’ Br. 28. Quite to the contrary, just as this Court held in *Denver*, Section 505 “fails to satisfy this Court’s formulations of the First Amendment’s ‘strictest,’ as well as its somewhat less ‘strict,’ requirements.” *Denver*, 518 U.S. at 755; *id.* at 803-804 (Kennedy, J., concurring in part and dissenting in part).

a. Section 505 is plainly unconstitutional under *Denver*. Significantly, the only part of *Denver* to garner a solid majority was the section of the opinion invalidating Section 10(b) of the 1992 Cable Act, 518 U.S. at 753-760, a provision the government described below in this case as “remarkably similar to Section 505” and which was most often compared to Section 505 at the preliminary injunction stage.⁴⁶ Indeed, in its supplemental brief in *Denver*, the Solicitor General noted that Section 505 “has effects similar to Section 10(b) of the 1992 Cable Act.” Supplemental Br. of Fed. Resp’ts at 3, *Denver*.

⁴⁵ J.S. App. 23a. While the *Denver* plurality may not have applied strict scrutiny explicitly, the result in that case was reached by “closely scrutinizing” the law “with the greatest care.” 518 U.S. at 743 (Court must “closely scrutiniz[e]” the provisions of Section 10 to ensure that it does not impose “an unnecessarily great restriction on speech.”); *id.* at 747 (plurality op.) (“Our basic disagreement with Justice Kennedy is narrow.”).

⁴⁶ See Defs. Opp’n Br. to the Mot. for Prelim. Inj. at 2-3, 4, 14, 21, 23, 24, 25, 26, 33, 34, 37, 40, 41, 43, 54, 58, 63, 68, 71 (20 separate citations comparing Section 505 to Section 10(b)).

Moreover, the only regulation upheld in *Denver*, out of the three at issue, merely permitted cable operators to reject indecent programming on leased access channels. In sharp contrast to Section 505, Section 10(a) imposed no requirement at all on cable operators to restrict indecent programming,⁴⁷ and the vast majority of cable operators apparently adopted no such policy.⁴⁸ Instead, Section 10(a) *expanded* cable operators' editorial control over leased access channels because it empowered them for the first time to accept or reject indecent programs on those channels.⁴⁹ Moreover, unlike the governmental mandate imposed by Section 505, there is no possibility that the voluntary rules approved in *Denver* would be vague or overly broad, since cable operators themselves were given the authority to define what programming is "indecent." Such leased access requirements can only be enforced pursuant to a "written and published policy," *Denver*, 518 U.S. at 752 (plurality op.) (published policy requirement "protects against over broad application of its standards"), and must be applied consistently to "substantially similar programming," *id.* at 752-753; see *Loce*, 1999 WL

⁴⁷*Denver*, 518 U.S. at 750 (plurality op.) (Court approved only *permissive* controls on indecent leased access programming), 768 (Stevens, J., concurring) ("The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition."), 779 (O'Connor, J., concurring in part and dissenting in part) (Sections 10(a) and 10(c) leave to the cable operator the decision whether or not to broadcast indecent programming), 823 (Thomas, J., concurring in part and dissenting in part) ("The permissive nature of §§ 10(a) and (c) is important in this regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right * * * to compete for space on an operator's system.") (citation omitted).

⁴⁸See *Cable Television Consumer Protection & Competition Act of 1992*, 62 Fed. Reg. 28371, 28371 (1997) (only about 100 cable systems per year expected to adopt a written policy limiting indecency); *Denver*, 518 U.S. at 745 (plurality op.) ("[t]he permissive nature of § 10(a) means that it likely restricts speech less than, not more than, the ban at issue in *Pacifica*").

⁴⁹*Denver*, 518 U.S. at 743 (plurality op.) (provision involves a complex balance of First Amendment interests); see also Brief for Fed. Resp'ts at 25, *Denver* (the rules "limit programmers' expressive activity only insofar as - and to precisely the same extent as - they expand that of the operators").

387150, at *15 ("we see no indication that Congress meant to imply that a cable operator could reasonably believe any given program to be patently offensive solely because of its source"). Section 505's mandate is not remotely comparable to the sole provision upheld in *Denver*.

b. The district court's factual findings in this case amply reveal that the government failed to demonstrate "that the recited harms [to be addressed by Section 505] are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."⁵⁰ After two years of litigation involving extensive discovery and two full hearings with extensive expert testimony, the district court concluded that "the Government has not convinced us that [signal bleed] is a pervasive problem." J.S. App. 36a.

The legislative history provides no support for the government's position. Section 505 was adopted as an eleventh hour amendment to a comprehensive telecommunications bill without discussion, supported only by the sponsors' unadorned assertion that "numerous" cable systems failed entirely to scramble their signals on adult channels. See 141 Cong. Rec. S8167 (daily ed. June 12, 1995). There were no hearings, debates, or congressional findings before Congress voted on the amendment. J.S. App. 54a. Moreover, no testimony or other evidence ever suggested that children would be harmed in any way by occasional or fleeting exposure to garbled cable signals. When the district court granted the temporary restraining order in this case, it noted that "the legislative record contains no findings as to how often this bleeding occurs, how many minors are exposed to the adult programming when the bleeding occurs or what effect such

⁵⁰ *Turner I*, 512 U.S. at 664; see *Denver*, 518 U.S. at 766 (plurality op.) ("[i]n the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it"); *Reno*, 521 U.S. at 858 n.24 (noting the lack of legislative investigation preceding passage of the Communications Decency Act).

exposure has on minors." M.A. App. 15a-16a (noting "an absolute void of legislative findings").

The district court challenged the government to provide "more specific evidence of the number of households with the potential for signal bleed" at the hearing on a permanent injunction, J.S. App. at 53a & n.16, but no such showing was made, *id.* at 36a. Although this Court has approved the use of judicial proceedings to supplement the abstract concerns of Congress where the legislative history lacks sufficient findings, *Turner I*, 512 U.S. at 664-668, and narrowly upheld the constitutionality of must carry regulations after a comprehensive record was compiled on remand, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-196 (1997) ("*Turner II*"), the differences between the *Turner* cases and this case are quite telling:

- Must carry rules were enacted only after years of detailed study, *Turner I*, 512 U.S. at 632; *Turner II*, 520 U.S. at 199 (Congress heard "years of testimony, and review[ed] volumes of documentary evidence and studies"), whereas Section 505 was adopted despite an "absolute void" of legislative findings.
- The FCC conducted a "contemporaneous study" of television stations that had been dropped from cable systems to support must carry rules, *Turner II*, 520 U.S. at 203, whereas here, there was no study of any kind, and the government could identify only 72 specific complaints "which the FCC believes are at least potentially related to indecent or sexually explicit cable programming" out of "33,000 informal written complaints about cable service generally."⁵¹

⁵¹ Pl. Ex. 119. The 72 complaints did not all relate to "sexually-oriented" channels or to the issue of signal bleed, but to programming on networks as diverse as HBO, Cinemax, The Movie Channel, Showtime, MTV, E!, CNN, Bravo, The Disney Channel, Viewer's Choice, A&E and Nickelodeon. Pl. Ex. 43.

- In *Turner*, the legislative record in support of must carry rules was supplemented by an additional 18 months of factual development in the courts "yielding a record of tens of thousands of pages of evidence" that included congressional findings, expert submissions, sworn declarations, and industry documents. *Turner II*, 520 U.S. at 187 (internal quotation omitted). Here, however, after two years of litigation, the government presented "no evidence on the number of households actually exposed to signal bleed," and managed to compile anecdotal evidence comprising "only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting." J.S. App. 11a-12a.

Ultimately, the government's evidence in support of Section 505 amounted to accounts of two city councilors, 18 individuals, one United States Senator, and the officials of one city.⁵² In *Denver*, this Court found similar evidence to be inadequate to support restrictions on indecent programming on public access channels. Although the record contained "anecdotal references to what seem isolated instances of potentially indecent programming," the plurality found that "these few examples do not necessarily indicate a nationwide pattern." *Denver*, 518 U.S. at 764 (plurality op.). The *Denver* plurality concluded that "the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end." *Id.* at 766. The same conclusion is warranted here, where the government failed to show that signal bleed is a pervasive problem. See Richard Posner, *Obsession*, NEW REPUBLIC, Oct. 18, 1993, at 34 ("in a nation of 260 million people, anecdotes [to establish problems of pornography] are a weak form of evidence"). In addition, the government failed to demonstrate that imposing the "safe harbor" under Section 505 "will in fact

⁵² J.S. App. 11a. The paucity of examples is all the more impressive in light of the active participation of *Amici* in the drafting of this law, and in preparing viewer testimony for the preliminary hearing and trial. Br. of *Amici* Family Research Council, et al., at viii.

alleviate [the] harms [of signal bleed] in a direct and material way." *Turner I*, 512 U.S. at 664; *Denver*, 518 U.S. at 766 (plurality op.). See *infra* pp. 44-45.

c. As explained more fully in the next section, Section 505 is unconstitutional because it is not the least restrictive means of addressing the government's interest. Although this Court conducted the same analysis of less restrictive regulations in *Denver*, and reached the same conclusion with respect to Section 10(b), the government now asks it to defer to the predictive judgments of Congress about the necessity of Section 505. Appellants' Br. 26-28. But the government's argument assumes that Congress has made "a reasonable choice among the available alternatives," Appellants' Br. 27, and only pays lip service to the need for judicial scrutiny "to assure that * * * Congress has drawn reasonable inferences based on substantial evidence." *Turner I*, 512 U.S. at 666. Contrary to the government's plea for judicial leniency, the case for deference is not persuasive where, as here, there is an "absolute void" of legislative fact-finding or deliberation. M.A. App. 15a. In addition, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Sable*, 492 U.S. at 129 (citation omitted).

The rationale for deference is weakened still further where Congress repeatedly has reached an opposite conclusion from the one now urged by the government, and routinely relies on individual user empowerment to protect minors.⁵³ This Court

⁵³ In addition to Section 504, Congress adopted V-chip requirements in the 1996 Act upon the finding that parents will take an active role in supervising their children. Telecomms. Act of 1996 § 551(a)(7), reprinted at 47 U.S.C. § 303 note ("[p]arents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control * * *"). Voluntary measures, according to Congress, such as "[p]roviding parents with timely information about the nature of upcoming video programming," provide a "nonintrusive and narrowly tailored means" of empowering parents. Telecomms. Act of 1996 § 551(a)(9), reprinted at 47 U.S.C. § 303 note; see also 47 U.S.C. § 544(d)(3) (notice requirement permits parents to block free access by non-subscribers to premium cable channels that provide films rated X, NC-17, or R).

has stressed that "we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as *some indication* that more restrictive means are not 'essential' (or will not prove very helpful)." *Denver*, 518 U.S. at 758 (plurality op.) (emphasis in original) (citing *Boos v. Barry*, 485 U.S. at 329). Here, the only congressional actions that fairly can be described as "predictive judgments" about less restrictive means undermine, rather than support, the government's position.

C. The District Court Correctly Held That Section 505 Is Not the Least Restrictive Means of Addressing the Government's Interest

In holding that Section 505 is not the least restrictive means, the district court straightforwardly applied settled law. J.S. App. 32a-39a. Under traditional First Amendment analysis, the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. at 799. The court below found that Section 505 required cable operators "to prevent [signal] bleed in all non-subscribing households, irrespective of whether a household has children," and that "two-thirds of all households in the United States have no children." J.S. App. 33a-34a. By contrast, the district court found that Section 504 is not content-based, *id.* at 35a, and that the existence of a content-neutral alternative "undercut[s] significantly" any defense of a content-based statute. *Id.* (quoting *Boos v. Barry*, 485 U.S. at 329). It concluded that "§ 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights."⁵⁴ The government's arguments that Section 504 is not an adequate alternative, and that

⁵⁴ J.S. App. 38a. To ensure that cable subscribers have adequate notice of their rights under Section 504, the district court directed Playboy to work with cable operators to provide such notice. Playboy has taken no position on the legality of such a command, and did not file a cross-appeal to this aspect of the decision below. In any event, Playboy's extensive arrangements to provide the contemplated notice are described in Playboy's Combined Opposition To Defendants' Post-Trial Motions at 10-11.

it is not less restrictive than Section 505 are unsupported and would require this Court to significantly alter its First Amendment jurisprudence.

1. The government's complaint about Section 504 with added notice requirements as being "hypothetical" or "uncertain" is most curious since courts routinely contemplate potential alternative measures. See *Reno*, 521 U.S. at 855; *Sable*, 492 U.S. at 130. Indeed, in *Denver*, this Court concluded that any perceived problems of voluntary blocking solutions could be cured by less burdensome means, and described a variety of "hypothetical" alternatives, including informational requirements, a simple coding system, or readily available blocking equipment accessible by telephone. 518 U.S. at 759. Here, it is the fact that Congress *could* have enacted an enhanced notice requirement for Section 504 – not that it did so – that undermines Section 505.⁵⁵

Quite obviously, the least restrictive means analysis calls upon courts to anticipate measures Congress might employ to achieve its stated goals, and it does not require that such measures actually be adopted and proven effective. To assume, as does the government here, that a regulatory alternative must have been previously enacted and litigated in order to qualify as a less restrictive means would gut this First Amendment doctrine. Congress would be empowered to censor speech at will merely by refusing to enact less restrictive measures if the law were as the government suggests. And its theory also would reverse the burden of proof, which currently requires the government to demonstrate that its chosen method of regulation is the least restrictive alternative. E.g., *Sable*, 492 U.S. at 129-130. The government cited no cases to support this novel interpretation, nor could it do so, for none exist.

⁵⁵Because a reviewing court may postulate possible alternative regulations, the district court's directive that Playboy provide "effective notice" of Section 504 is not essential to the decision. It is sufficient that Congress might have adopted such a requirement.

The government's argument that inert, indifferent, or distracted parents doom any alternative regulation was specifically considered and rejected by a majority of this Court in *Denver*. There, citing the government's "independent interest" in protecting minors, Appellants asserted, just as they do here, that "innumerable parents," through "absence, distraction, indifference, inertia, or insufficient information" would fail to take advantage of "subscriber-initiated measures to protect children from viewing indecent programming."⁵⁶ Although the *Denver* majority "assume[d] the accuracy of this statement," noted the existence of "inattentive parents," and conceded that "[n]o provision * * * short of an absolute ban can offer certain protection against assault by a determined child," it did not find these factors to be sufficient grounds to justify more restrictive measures. 518 U.S. at 758-759. Instead, it described a number of possible alternative regulations that could be adopted to deal with "the Solicitor General's list of practical difficulties" including – as here – "informational requirements."⁵⁷ The *Denver* finding is highly significant to this case, since the "practical difficulties" of individualized blocking on leased access channels are even greater than for the channels targeted here.⁵⁸

⁵⁶Brief of Fed. Resp'ts at 36-37, *Denver*. The government argued that "[p]arents would have to discover that leased access channels convey indecent programming into their homes even though they never specifically ordered it; they would have to learn about – and focus on – their option to block such programming; and they would have to take the initiative to ensure that such programming is in fact blocked." *Id.*

⁵⁷518 U.S. at 759. This Court also mentioned Section 505 as one potentially less restrictive alternative in *Denver* because it analyzed the Communications Act "as recently amended." 518 U.S. at 756. However, it emphasized that the constitutionality of Section 505 and the other provisions in the 1996 Act was not before it, and it was not deciding "whether the new provisions are themselves lawful." *Id.*

⁵⁸In *Denver*, Justice Thomas pointed to the "distinguishing characteristic of leased access channels," which have no centralized editor and where indecent programming "is especially likely to be shown randomly or intermittently between non-indecent programs." 518 U.S. at 833-834 (internal quotations omitted). However, such concerns about the effectiveness of voluntary blocking

As this Court expressly recognized in *Denver*, the government's argument that programming in *all* homes in a community must be restricted because *some* will not use effective measures to control their own access represents a significant reordering of First Amendment doctrine. Such a striking reinterpretation of the law would not be limited to the context of signal bleed, or even to the cable television medium, but would extend to any setting where a less restrictive regulation depends on user empowerment and individual responsibility. To accept the government's position here would overturn the long-established principle that the state cannot reduce the adult population to only what is fit for a child. *Reno*, 521 U.S. at 875; *Denver*, 518 U.S. at 759; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

2. Contrary to the government's position in this case, Section 504 is not merely a less restrictive alternative, it is also an effective one. This alternative tailors the regulatory solution only to those homes that actually experience signal bleed, or that have not already blocked it using non-regulatory means, and it prevents signal bleed around the clock once deployed. There is no serious question in this case but that individualized blocking pursuant to Section 504 effectively prevents signal bleed when it is used. The district court found that installation of a blocking device under Section 504 effectively "eliminate[s] reception both of undesired channels and of undesired signal bleed." J.S. App. 10a. And the government acknowledges that "parents who had strong feelings about the matter could see to it that their children did not view signal bleed."⁵⁹

do not apply where the objective is to block an entire channel, as is the case with Section 504.

⁵⁹Appellants' Br. 33. The same is true of the V-chip, which depends on parental involvement. The government erroneously states that Playboy conceded that the V-chip will not prevent signal bleed. *Id.* at 35-36 n.25. Although Playboy acknowledged that the V-chip was not *designed* to stop signal bleed, Mot. to Affirm at 5 n.4, it nevertheless could be used for that purpose. The government correctly notes that signal bleed obliterates the transmission of

The government's only argument with regard to the effectiveness of Section 504 is its conjecture that "perhaps a large number of parents," Appellants' Br. 33, will be too lax to use the means that the government has made available. The suggestion that the relatively low rate of lockbox distribution shows the ineffectiveness of voluntary measures, *id.* at 37, overlooks the government's failure to prove the pervasiveness of signal bleed. Because Appellants could locate only a handful of anecdotal accounts of signal bleed in the 16 years Playboy Television has been on the air, the court below quite reasonably concluded that "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." J.S. App. 36a. The important point here is not how many lockboxes have been distributed, but that, in the very few cases in which the government was able to document a problem, Section 504 was effective in solving it. J.S. App. 12a ("[i]n each instance, the local MSO offered to, or did in fact, rectify the situation for free (with the exception of 1 individual), with varying degrees of rapidity").

In addition, the government's theory that parents are too unaware or unconcerned to make voluntary measures work cannot be reconciled with the marketplace response to the issue. The consumer electronics industry has developed and marketed cable television converter boxes, televisions and VCRs with built-in child-lock circuitry, and the vast majority of televisions now on the market incorporate such features. The cable television industry provides consumers with technical assistance to address issues such as signal bleed, and its principal trade association adopted a policy to provide blocking of signal bleed on request even before Section 504 was adopted. *See supra* pp. 4-5. Quite apart from the

program ratings, but it overlooks the fact that, under the FCC's technical rules that were adopted after the trial below, V-chips have been designed to enable parents to block unrated programming. *See Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, Implementation of Sections 551(c), (d), and (e) of the Telecomms. Act of 1996*, 13 FCC Rcd. 11248, 11255 (1998); 47 C.F.R. § 15.120(e)(2).

less restrictive regulatory measures such as Section 504, none of the private sector responses would exist if consumers were as apathetic as the government now assumes.

To whatever extent voluntary blocking fails to provide a complete solution to the phenomenon of signal bleed, it is still more effective than time channeling by the government's own reckoning. First, the same factor that prompted the government in this case to describe time channeling as a modest restriction, Appellants' Br. 24 & n.17 — the widespread availability of VCR machines — undermines its assumptions as to the effectiveness of Section 505 to protect children. The FCC in the past rejected the use of a safe harbor as a sufficient alternative to protect children from indecent programming because of VCRs in children's rooms,⁶⁰ and the same logic applies here. Second, unlike Section 504, which completely blocks signal bleed, time channeling ceases at 10 p.m., and the district court pointed out that "a resourceful minor can still watch signal bleed after the safe-harbour hours."⁶¹ Even if Section 504 did not provide an effective solution to signal bleed, Section 505 would be subject to a First Amendment challenge because it provides only limited or incremental support for the interest asserted. *Greater New Orleans Broad. Ass'n. Inc. v. United States*, ___ U.S. ___, 119 S. Ct. 1923, 1932-34 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984); *Bolger*, 463 U.S. at 73.

⁶⁰Implementation of Section 10 of the Cable Consumer Protection & Competition Act of 1992, 8 FCC Rcd. 998, 1009 (1993) (expressly declining to adopt time channeling for leased access programming under the 1992 Cable Act); *Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5306-07 (finding that time channeling is ineffective because of VCRs in children's rooms). As *Amici* noted, "indecent material is plentiful and readily available to adults everywhere." Brief of *Amici* Family Research Council, et al., at 19-20.

⁶¹J.S. App. 37a. For example, in one of the government's few examples, a child reportedly was exposed to unscrambled "pornography" (on an undisclosed channel) at a slumber party late at night, after the parents had gone to bed. Omlin Dep. Tr. 13-14, 18-20.

3. Finally, there is no substance to the government's speculative claim that an "enhanced" Section 504 is more restrictive than Section 505. The district court pointed out that Section 505 is more restrictive in the constitutional sense because it is content-based. J.S. App. 35a. Moreover, this Court in *Denver* noted that a provision that *allows* cable operators to drop indecent programming or even a rule that "create[s] a risk that a program will not appear" is "significantly less restrictive" than a mandatory restriction such as time channeling. 518 U.S. at 746-747 (plurality op.).

In any event, there is no support for the government's assertion that an "enhanced" Section 504 would render carriage of adult channels "uneconomical." Appellants' Br. 35-40. This argument is premised on a number of factual assumptions, none of which is borne out in the record. Even if this Court were to assume that existing notice to subscribers has been inadequate,⁶² the government never demonstrated that signal bleed is such a pervasive problem that increased awareness would lead to a huge increase in demand for blocking devices or that the cost of blocking devices under Section 504 would be prohibitive.⁶³

Whether or not notice was "adequate" in the past, adopting measures to increase public awareness of Section 504 would not

⁶²Although for purposes of its current argument the government asserts that subscribers had not previously been informed about the availability of blocking devices, it stressed to the district court the comprehensive efforts undertaken by the NCTA, the major cable operators, and adult programmers to inform subscribers of the availability of blocking devices. Defs. Post-Trial Br. 40-42; Defs. Exs. 139, 140; Pl. Exs. 35, 147, 194, 196; see J.S. App. 20a. The district court never found that current efforts were inadequate, but only questioned their sufficiency due to the response rate. However, the absence of a finding on this point merely indicates that the government failed to meet its burden of proof. *Sable*, 492 U.S. at 129-131.

⁶³The government asserts incorrectly that an enhanced Section 504 was not discussed below or that the district court never analyzed that point. Appellants' Br. 40. On the contrary, the issue was addressed specifically at oral argument by both Playboy and the government. Closing Argument Tr. 47-51, 104-110, 129-130.

lead to a significant increase in demand for blocking devices to the extent signal bleed is not a serious problem or if non-regulatory alternatives are sufficient to address it. As noted above, the district court found that "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem," and that the government "has not convinced us that it is a pervasive problem." J.S. App. 36a. Accordingly, it is far from "inescapabl[e]," as the government now asserts, Appellants' Br. 37, that an enhanced Section 504 would lead to a huge increase in demand for blocking devices.

Even if there were a significant increase in demand for blocking devices, however, the government never demonstrated that Section 504 would lead to greater restrictions on adult channels. It strains credulity to assume that enhanced notice requirements would increase the number of complaints from the "handful of isolated incidents" in the record below, J.S. App. 11a-12a, to the millions that would be required to make adult channels uneconomical.⁶⁴ In addition, the government and the court below vastly overstated the cost of compliance. Where traps are placed on a subscriber's line to prevent unwanted signal bleed (as opposed to preventing theft of a premium service), a blocking device may be easily installed by a customer in the home without the need for a service call.⁶⁵

The government's expert agreed that profit-maximizing cable operators would use the most economical means of compliance, Trial Tr. 705-707, and eliminating the cost of a service call alone

⁶⁴Six percent of the 62 million cable television households in the United States – the number used in the government's "break-even" analysis – is equal to 3.72 million households.

⁶⁵The government's expert demonstrated the ease with which positive traps can be installed by customers, and testified that such traps could be mailed to customers at minimal expense. Prelim. Inj. Tr. at 371-372. The government's expert also agreed that negative traps could be installed in the same manner by subscribers. Jackson Dep. Tr. 24-26.

reduces the cost of compliance with Section 504 by more than 80 percent. This single adjustment would change the government's "break-even" point from 6 percent to 24 percent, or approximately 15 million cable households. Not only did the government vastly overestimate compliance costs, but its break-even analysis also underestimated cable operators' revenues. Once this deeply flawed analysis is corrected with accurate buy rates for adult programming and adjusted to account for the life of the hardware, the true "break-even" point is 80 percent. See Pl. Post-Trial Reply Br. at 44-48; Closing Arguments Tr. at 51. Thus, even if the majority of cable subscribers asserted their rights under Section 504, it would not be remotely as restrictive as Section 505.

It is important to note, finally, that the government's economic argument is based on a false dichotomy. The issue is not whether Section 504 may be more restrictive than Section 505; it is whether Section 504, standing alone, is more restrictive than Sections 504 and 505 together. See Appellants' Br. 39 (even with safe harbor restrictions, subscribers will seek blocking devices under Section 504); Br. of *Amici* Family Research Council, et al., at 25 (Section 504 blocking is intended to be used in addition to Section 505 restrictions). As adopted by Congress, the Telecommunications Act includes both Section 504 and Section 505. It is illogical to suggest that Section 504, standing alone, is more restrictive than existing law.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE GOVERNMENT'S POST-TRIAL MOTIONS

The district court properly dismissed the government's post-trial motions for lack of jurisdiction. J.S. App. 91a. Appellants' Rule 59(e) motion to alter or amend the judgment by limiting relief solely to Playboy, as well as its Rule 60(a) motion seeking to add the district court's "effective notice" language to the Order, violated the well-settled rule that "[t]he filing of a notice of appeal is an event of jurisdictional significance," and that a federal district court and a reviewing court "should not attempt to assert jurisdiction over a case simultaneously." *Griggs v. Provident*

Consumer Discount Co., 459 U.S. 56, 58 (1982). By noticing its appeal, the government deprived the district court of jurisdiction to consider its post-trial motions. *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389, 390 n.2 (1982). As the leading Supreme Court procedure treatise makes clear "[a]n attempt by the district court to change the judgment after a notice of appeal from its ruling has been filed is ineffective." Stern & Gressman at 392.

The government's brief makes clear that its actual complaint is with this Court's rules, and not with the decision below. The controversy arises from a perceived ambiguity in Rule 18.1 that assertedly forced it to file its notice of appeal while the post-trial motions were pending in the district court or risk forfeiting its right to appeal. Appellants' Br. 42. However, it has been this Court's consistent practice since *Department of Banking v. Pink*, 317 U.S. 264 (1942) (*per curiam*) to toll the time for filing petitions for certiorari until after petitions for rehearing are denied. See *Missouri v. Jenkins*, 495 U.S. 33, 45-50 (1990). This also has been the practice for motions to reconsider judgments of federal district courts that are directly appealable to this Court. *Communist Party v. Whitcomb*, 414 U.S. 441, 444-446 (1974); see also Stern & Gressman, at 284-285. This Court generally avoids interpretations of procedural rules that would have the effect of cutting off the government's right to appeal. E.g., *Jenkins*, 495 U.S. at 50; *Forman v. United States*, 361 U.S. 416, 426 (1960). Accordingly, the government's claim that it was compelled to file its notice of appeal in order to preserve its rights is not credible, and its professed concern over the wording of Rule 18.1 would be more sensibly resolved by appeal to this Court's ability to clarify its own rules.

Having decided to file its notice of appeal from the district court's ruling, however, the government cannot avoid the jurisdictional implications of its act. Appellants' post-trial motions sought to alter the substantive nature of the decision below, and not to correct "clerical mistakes" as the government characterizes them. As this Court established in *League of Women*

Voters, it may be appropriate to exercise simultaneous appellate jurisdiction while the lower court resolves a post-trial motion only where the post-trial motion is entirely collateral and "uniquely separable from the cause of action." 468 U.S. at 373-374 n.10 (citation omitted). There, the post-trial motion had no effect on "the prompt determination by the court of last resort of disputed questions of constitutionality of acts of the Congress." *Id.* (citation omitted). Here, however, the Telecommunications Act established an expedited appeal procedure for the very purpose of permitting this Court to rule on disputed questions of constitutionality. Telecomms. Act of 1996 § 561(b), reprinted at 47 U.S.C. § 223 note (Supp. III 1998). In this context, Appellants' Rule 59(e) motion to limit relief only to Playboy would have essentially nullified Playboy's facial challenge to Section 505. This Court rejected the government's identical modification request in *Reno v. ACLU*, concluding that "[w]e have no authority * * * to convert this litigation into an 'as-applied' challenge," 521 U.S. at 883, and it should do the same thing here. Thus, even if the district court had jurisdiction to consider the government's post-trial motions, it would have been compelled to reject them pursuant to *Reno*.⁶⁶

The government's claim that the district court could have asserted jurisdiction over its post-trial motions because a direct appeal to this Court "functions similarly" to an appeal under Rule 4, Fed. R. App. P., as it existed before 1979, Appellants' Br. 43-44, is similarly unavailing. It simply is incorrect to suggest, as does the government here, that there is "no chance" that the district court would be acting on a post-trial motion at the same time as this Court because the appellant is allowed 60 days to file a jurisdictional statement. *Id.* at 44. Unlike the situation under the former Rule 4, the process for initiating appellate jurisdiction is

⁶⁶Appellants' Rule 60(a) motion also would have materially altered the district court's judgment by including in the Order the instruction that Playboy ensure cable systems carrying its programming provide notice of Section 504 to their subscribers. As noted above, the proposed modification would have affected Playboy's substantive rights.

not entirely within the lower court's control. Under Rule 18.1 the appellant may file its jurisdictional statement before the 60-day deadline, or the district court could be delayed in issuing a decision that resolves the post-trial motion. In addition, it would vastly complicate an appellant's ability to prepare a jurisdictional statement that adequately identifies the substantial federal questions at issue if the judgment may be altered in the interim by the district court. The government's theory would cause great confusion over this Court's appellate jurisdiction, and it should be rejected.

CONCLUSION

For the foregoing reasons, Playboy respectfully urges this Court to affirm the decision below.

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**Addendum to Brief of Appellee
United States v. Playboy
No. 98-1682**

***Appellee Playboy Entertainment Group, Inc.'s Exhibits
Referenced in Brief of Appellee***

Pl. Ex. 1	Declaration of Anthony J. Lynn, President, Playboy Entertainment Group, Inc., May 1996
Pl. Ex. 4	Declaration of Leland Wayne Hall
Pl. Ex. 5	Playboy Films and Programs Licensed to HBO
Pl. Ex. 6	Programming Licensed to Playboy TV and other PPV/Premium Networks (By Distributor)
Pl. Ex. 18	Programming Shown On And Taped From Non-Adult Cable Networks
Pl. Ex. 27	Defendants' Responses to Plaintiff Playboy Entertainment Group, Inc.'s Requests for Admissions and Interrogatories, General Objections and Request for Admission No. 1
Pl. Ex. 35	National Cable Television Association (NCTA) Resolution on Sexually- Oriented Programming Services, February 2, 1995
Pl. Ex. 43	Package of consumer complaint letters directed to the FCC and Members of Congress; replies to same
Pl. Ex. 60	Declaration of John Mansell, 1996

Pl. Ex. 62	Declaration of John Mansell, January 20, 1998.
Pl. Ex. 62(b)	b. TV and Digital TV Household Universe: 1979-2007
Pl. Ex. 117	Comments of Playboy Entertainment Group, Inc., filed April 26, 1996 with the FCC in: <i>In re Implementation of Section 505 of the Telecommunications Act of 1996</i> , CS Dkt. No. 96-40.
Pl. Ex. 118	Request for Expedited Declaratory Ruling filed with the FCC by Playboy Entertainment Group, Inc. to Clarify Compliance Obligation Under Section 505 of the Telecommunications Act of 1996 with Exhibits, filed November 19, 1997
Pl. Ex. 119	Defendants' Responses to Plaintiff Playboy Entertainment Group, Inc.'s First Interrogatories, Nos. 1, 2, 4, 5, 6, 7, 8, 10, 11, 12, 13
Pl. Ex. 132	Playboy's Editorial Guidelines
Pl. Ex. 147	Letter from Barry Marshall of TCI to Dwight P. Clark explaining TCI's policy regarding carriage of adult oriented programming services
Pl. Ex. 149	Memo from Barry Marshall to Divisions / Region Vice Presidents et al., re: TCI Adoption of NCTA Adult Programming Commitments, July 31, 1995

Pl. Ex. 194	Jones Intercable flyer offering parental control and blocking devices for cable television
Pl. Ex. 196	TCI mailer offering parental control and blocking devices
Pl. Ex. 219	Consumer Research Data Base Tracking of Pay Per View Purchase Behavior, TWC Research Brief, November 2, 1994 (Sealed but for these statistics)
Pl. Ex. 210	Letter from Pamella R. Thorne, Vice President, Government and Community Relations, Time Warner (Houston, TX) to Mayor and City Council of Hunters Creek Village, TX re: options for blocking adult programming
Pl. Ex. 225	Letter from Marc Jaffe, Cable Television Program Manager, City of San Diego, CA, to Elizabeth Beaty, Chief, Financial Analysis and Compliance Division, FCC, June 24, 1997
Pl. Ex. 245	Letter from Patrick Trueman, U.S. Department of Justice, to Renee Licht, Federal Communications Commission, July 13, 1992

Appellants' Exhibits Referenced in Brief of Appellee

Defs. Ex. 1	Videotape, Poway, CA, 1994
Defs. Ex. 3	Videotape, Spice, Channel 95, Arlington, VA, March 28, 1996
Defs. Ex. 4	Videotape, Channels 44 and 45,

Orange, CA, November 27, 1994

Defs. Ex. 36	<i>360 – Sex in The USA</i> (Playboy video)
Defs. Ex. 37	<i>Hot, Sexy and Safer with Suzi Landolphi</i> (Playboy video)
Defs. Ex. 38	<i>Doin' It Right</i> (Playboy video)
Defs. Ex. 39	<i>1997 Video Playmate Calendar</i> (Playboy video)
Defs. Ex. 40	<i>Playboy Late Night, #97-10</i> (Playboy video)
Defs. Ex. 41	<i>World of Playboy, #97-11</i> (Playboy video)
Defs. Ex. 42	<i>9 ½ Weeks</i>
Defs. Ex. 43	<i>The Unbearable Lightness of Being</i>
Defs. Ex. 83(d)	Rebuttal Statement of Jackson and Kramer, January 20, 1998
	d. Connection Cable Systems to subscribers' TVs and VCRs – Guidelines for the Cable Television Industry
Defs. Ex. 139	Parental control advisory material from various cable operators
Defs. Ex. 140	Preliminary Injunction Declaration of John Roth Woods

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551	Testimony of Elissa Benedek, M.D., expert witness for Defendants
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705-707	Testimony of James N. Dertouzos, Ph.D., expert witness for Defendants

Preliminary Injunction (May 20-22, 1996) Testimony Referenced in Brief of Appellee

Pages Referenced	Individual Testifying
13-14	Testimony of Anthony J. Lynn, President, Playboy Entertainment Group, Inc.
39-41	
371-372	Testimony of Jonathan Kramer, expert witness for Defendants

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No. 98-1682

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNITED STATES OF AMERICA, et al.,
Appellants,

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellee.

On Appeal from the United States District Court
for the District of Delaware

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Appellee Playboy Entertainment Group, Inc. ("PEGI") notes that it is a non-publicly traded corporation organized under the laws of Delaware and is a wholly-owned subsidiary of Playboy Enterprises International, Inc. ("PEII"), a non-publicly traded corporation organized under the laws of Delaware. PEII is a wholly-owned subsidiary of PEI Holdings, Inc. ("PEI Holdings"), a non-publicly traded corporation organized under the laws of Delaware. PEI Holdings is a wholly-owned subsidiary of Playboy Enterprises, Inc., a publicly traded corporation organized under the laws of Delaware.

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UNITED STATES OF AMERICA, et al.,
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v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellee.

On Appeal from the United States District Court
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BRIEF OF APPELLEE

Appellee Playboy Entertainment Group, Inc. ("Playboy") respectfully requests that this Court affirm the decision of the three-judge district court that Section 505 of the Telecommunications Act of 1996, 47 U.S.C. § 561 (Supp. III 1998) ("the Act"), violates the First Amendment to the United States Constitution. Playboy further asks that this Court affirm the district court's dismissal of Appellants' post-trial motions to modify the judgment.

STATEMENT

At issue here is Section 505 of the Telecommunications Act of 1996, a statute that forced Playboy Entertainment Group, Inc.'s cable television networks off of most cable systems except during a late night/early morning window of eight hours called the "safe harbor" period. Before Section 505 was implemented in May 1997, a growing number of the more than 500 cable systems that carried one or both of Playboy's networks did so on a 24-hour basis. Trial Tr. 22.¹ After implementation, approximately 70 percent of the systems surveyed by the government had reduced Playboy's networks to the so-called safe harbor hours, J.S. App. 16a-17a,² a time described by one court of appeals as "broadcasting Siberia," when most viewers are asleep.³

Adopted to address an episodic phenomenon known as "signal bleed," Section 505's broad restrictions on protected speech are excessive and its protections are redundant, as the court below found. Numerous non-regulatory options either prevent, or provide cable subscribers with the ability to block, signal bleed

¹All exhibits and testimony referenced throughout this brief are more specifically identified in the attached Addendum. See Appellants' Br. 5 n.1.

²J.S. App. refers to the Appendix attached to the Jurisdictional Statement filed by the Appellants. M.A. App. refers to the Appendix attached to the Motion to Affirm filed by Playboy Entertainment Group, Inc. Although the Solicitor General sought and received Playboy's and the Court's permission to dispense with the preparation of a Joint Appendix, he lodged with the Clerk five videotapes that are part of the record in this case plus a six-page excerpt from Defendants' Post-Trial Brief to the district court. Letter from Seth Waxman to William K. Suter (August 27, 1999). However, the material lodged is neither fully representative of the record below, *see, e.g.*, note 16, *infra*, nor does it represent "generally known facts" that are appropriate for judicial notice. Robert L. Stern, Eugene Gressman, et al., *SUPREME COURT PRACTICE* 556 (7th ed. 1993) ("Stern & Gressman") (citation omitted).

³*Becker v. FCC*, 95 F.3d 75, 82, 84 (D.C. Cir. 1996) (time channeling relegates programming to "broadcasting Siberia," deprives speakers of their "preferred audience" and "inevitably interfere[s] with . . . freedom of expression"). The remaining cable systems were already in compliance without the need to make technical changes. Trial Tr. 37.

from any channel. In addition, less restrictive regulations, including Section 504 of the Telecommunications Act, provide effective alternative solutions for signal bleed. Without regard to such measures, Congress passed Section 505 as a floor amendment the same day that it was offered, without any debate or legislative findings. Purportedly enacted to protect children, Section 505 unnecessarily limits Playboy's right to speak to even the two-thirds of adult households that have no children under 18. J.S. App. 34a. Accordingly, the three-judge district court held correctly that Section 505 violates the First Amendment.

1. Since 1982, Playboy has provided cable operators with adult, sexually-oriented programming on premium networks. J.S. App. 5a, 12a.⁴ Playboy Television is a video version of its namesake magazine. Its format features adult-oriented programming that includes films, short-form videos, live talk shows, and lifestyle programming such as book and movie reviews, news, and music videos. Pl. Ex. 1 at ¶ 10. Playboy Television also offers special-event programming such as Playboy's well-received, four-hour program on AIDS awareness and safe sexual practices done in connection with the World AIDS Day created by the World Health Organization. Trial Tr. 116-117. AdultTVision and Spice offer almost exclusively full-length movies. Pl. Ex. 1 at ¶ 13. Other premium cable networks such as Showtime, HBO, and Cinemax license many of the same programs that are shown on adult-oriented channels, either from Playboy or other independent producers. Pl. Exs. 5, 6; Prelim. Inj. Tr. at 13-14, 39-41.

Like the providers of other premium networks, Playboy fully scrambles the video and audio portions of its programs when it transmits them to cable operators. The operators must descramble

⁴When this litigation began, Playboy provided programming on two networks, Playboy Television and AdultTVision, the latter launched in 1994. Playboy recently acquired Spice Entertainment Companies, Inc. ("Spice") (formerly Graff Pay-Per-View, Inc.), which was a party below in a consolidated action through the preliminary injunction stage. The Spice Hot Network was not purchased by Playboy as part of the transaction. Califa Entertainment Group, Inc. purchased Spice Hot in a separate transaction with Spice.

these transmissions before rescrambling the signal to restrict access to only those customers who have paid for the service. Individual subscribers descramble the premium channel using a set-top box called an addressable converter. A phenomenon known as "signal bleed" may occur when discernible video and/or audio appears on cable customers' televisions although they have not purchased the premium channel or event. The court below described the nature and causes of signal bleed, and found that the "severity of the problem varies from time to time and place to place, depending on the weather, the quality of the equipment, its installation, and maintenance." J.S. App. 9a, 51a.

A variety of non-regulatory means are available to consumers to ensure they do not receive signal bleed. Record evidence demonstrates that cable television converters with "channel mapping" features do not permit signal bleed. J.S. App. 51a. Further, addressable converters typically have built in parental lock-out devices. Pl. Ex. 4. Such converters are routinely used by most multiple system operators ("MSOs"), including Time Warner, TCI, Jones Intercable, and Harron Communications. Pl. Exs. 4, 149, 194, 210. The government's technical expert agreed that many of the most popular configurations for wiring together televisions, VCRs, and cable converters can prevent signal bleed, and instructions for such configurations are provided in product manuals and industry publications.⁵ In addition, the cable industry's leading trade association adopted a policy to resolve signal bleed problems upon request well before passage of the Act.⁶

⁵Jackson Dep. Tr. 135-137, 155-157. The cable industry provides guidance to consumers on such wiring configurations. See Defs. Ex. 83(d) *Connecting Cable Systems to Subscribers' TVs and VCRs - Guidelines for the Cable Industry* by the NCTA Engineering Committee Subcommittee on Consumer Interconnection.

⁶In February 1995, the National Cable Television Association adopted a policy that included voluntary blocking on request plus five other measures to facilitate parental control. Pl. Ex. 1 at ¶ 33; Pl. Ex. 35.

Finally, many televisions and VCRs already have built-in child-lock circuitry that allows parents or others to completely lock out the audio and video of any channel, thereby preventing signal bleed. In a recent survey, 80 percent of more than 100 models of televisions currently being sold by a major electronics store contained built-in child-lock circuitry, which has been available for at least the past several years. Pl. Ex. 62. During this period, more than 70 million new televisions were sold in the United States. Pl. Ex. 62(b).

2. As part of the Act, Congress adopted a number of measures designed to enable parents to protect children from "indecent" or other television programming considered to be objectionable. Section 504 requires cable operators, without an additional charge, to "fully scramble" or otherwise "fully block the audio and video programming" of any channel upon the request of a customer who does not subscribe to the channel. 47 U.S.C. § 560 (Supp. III 1998). Similarly, Section 551, the so-called V-chip provision, requires that new televisions include circuitry to enable parents to block video programs that contain "sexual, violent, or other indecent material about which parents should be informed before it is displayed to children." 47 U.S.C. § 303 note (Supp. III 1998).

Congress also enacted Section 505, the subject of this appeal, which requires that for any channel of service "primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." 47 U.S.C. § 561(a). Any multichannel video programming distributor (referred to generally herein as a "cable operator") that could not meet the "block or scramble" requirements of Section 505(a) within 30 days after the Act was signed was required to cease all programming on the designated channels "during the hours of the day when a significant number of children are likely to view it." 47 U.S.C. § 561(b). The Federal Communications Commission subsequently decided that these blackout hours run from 6 a.m. to 10 p.m. *Implementation of Section 505 of the*

Telecomms. Act of 1996, 11 FCC Rcd. 5386, 5387 (1996) ("Implementation of Section 505").

3. Playboy brought suit in the United States District Court for the District of Delaware seeking injunctive relief and a declaration that Section 505 is unconstitutional. Before Section 505 took effect, Playboy sought and received a temporary restraining order enjoining its implementation and enforcement. M.A. App. 18a-19a. But after a hearing on the motion for a preliminary injunction, the three-judge district court denied Playboy's motion for a preliminary injunction. J.S. App. 40a-86a. The district court said, "[a]t that time, it was not clear what any given MSO, with a system emitting signal bleed, would do when faced with complying with § 505." J.S. App. 16a. The court also noted its uncertainty about how many homes with the "potential" to receive signal bleed in fact receive it, and it asked for "more specific evidence" in subsequent proceedings on the actual extent of signal bleed as well as any evidence of its ill-effects on children. *Id.* at 61a, 72a & n.25, 79a-80a.

After this Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997), but before the hearing on the permanent injunction below, Playboy filed a motion for summary judgment on the question of statutory vagueness. Playboy argued that the vagueness of the indecency standard, coupled with a total absence of relevant FCC precedent, prevented it from providing alternative programming during non-safe harbor hours, thus making Section 505 both uncertain and overbroad. Appellants filed a cross-motion for summary judgment on the same issue. The district court denied both parties' motions, but noted the "fundamental uncertainty" about the definitions in the law and cited the lack of interpretive guidance from the FCC. M.A. App. 25a. Playboy subsequently filed a request for an expedited declaratory ruling with the FCC seeking clarification of Section 505's indecency standard and asking for an advisory opinion with respect to nine programs that, with one exception, Playboy Television had either aired, or

planned to transmit, on its network.⁷ The FCC denied the request, M.A. App. 28a-29a, and provided no further guidance, except to argue at trial that all of the programs submitted to the FCC, including the safe sex documentaries, would be considered indecent if transmitted on Playboy Television. Defs. Post-Trial Br. at 67-69.

The vagueness of the statutory mandate thwarted Playboy's efforts to mitigate Section 505's censorial impact. Ever since Section 505 was adopted, Playboy repeatedly sought clarification from the government⁸ and attempted to modify its programming schedule in order to minimize the law's restrictions and to preserve its access to adult subscribers.⁹ Despite this and other ongoing attempts to understand the meaning and implications of the law, the FCC repeatedly rebuffed Playboy's efforts, applying its "generic" definition of indecency and asserting that no explanation of the terms was needed beyond their plain

⁷Pl. Ex. 118. The request included two safe sex documentaries produced for World AIDS Day (*Doin' it Right* and *Hot, Sexy and Safer*), two critically acclaimed theatrical films (*9-1/2 Weeks* and *The Unbearable Lightness of Being*), two magazine style Playboy news programs (*360 - Sex in the USA* and *Playboy Late Night*), a recurring program that describes a current issue of Playboy magazine and events related to Playboy (*World of Playboy*), a recurring feature on Playboy centerfold models (*Video Playmate Calendar*), and an action-adventure film (*Rambo: First Blood, Part II*). A videotape of each of the programs was provided to the FCC and to the court below. Defs. Exs. 36-43.

⁸See Pl. Ex. 117 (Comments of Playboy Entertainment Group, Inc., *Implementation of Section 505 of the Telecomms. Act of 1996*, CS Dkt. No. 96-40 (Apr. 26, 1996)).

⁹Playboy explored "every option" to retain viewers in the wake of Section 505, Trial Tr. 284-285, including an attempt to selectively reprogram its feed for its largest markets to regain prime time carriage. *Id.* at 114-120, 328-329. Playboy adjusted its satellite feed, attempted to use a masking sound track, and explored additional ways to adjust its programming to comply with Section 505. *Id.* at 123-125 (investigating costs of purchasing or renting a new transponder), 125-129 (describing Playboy's audio-masking feed), 282-284 (exploring the use of digital satellite services such as DirecTV, PrimeStar, and EchoStar to offer different programming during non-safe harbor hours).

meanings.¹⁰ As a result, no cable operators who reduced their hours of operation to comply with Section 505 transmitted any Playboy programming outside the safe harbor hours. Trial Tr. 122.

4. Following an evidentiary hearing on the request for a permanent injunction, the district court held that Section 505 is unconstitutional. J.S. App. 1a-39a. Although the court had been skeptical at the preliminary injunction stage of the potential losses that would be caused by Section 505, it found that the "restrictiveness of § 505 is now evident" given Playboy's experience following the law's implementation. J.S. App. 33a. It noted that neither Playboy nor the government could identify a single cable system that had adopted any approach other than time channeling, and concluded that cable operators had "no practical choice but to curtail such programming" for two-thirds of the broadcast day in all households, whether or not children were present. *Id.* at 16a-17a. It concluded that the time channeling requirement of Section 505 "diminishes Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech." *Id.* at 33a-34a.

The district court also noted that the pervasiveness of signal bleed had not been established. Rather, the court held that the government presented "no evidence on the number of households actually exposed to signal bleed," and instead offered anecdotal evidence comprising "only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting." *Id.* at 11a-12a. It found that the lack of evidence provided by the government at trial "is reflected by the same dearth of evidence of harm within the legislative history of § 505." *Id.* at 29a. While the district court agreed that Section 505 was intended to address a compelling interest, it pointed out that the "mere articulation of a theoretical harm is not enough." *Id.* at 28a.

¹⁰See Pl. Ex. 27 at 14; *Implementation of Section 505*, 11 FCC Rcd. at 5387. The FCC defined "indecent" programming under Section 505 "the same as in other video programming contexts." 11 FCC Rcd. at 5387 & n.13.

Comparing Sections 504 and 505 as alternative ways to deal with signal bleed, the court concluded that "§ 504 is not restrictive of anyone's First Amendment rights and is clearly 'less restrictive'" than Section 505. J.S. App. 34a. Significantly, the court found that "two-thirds of all households in the United States have no children" but that Section 505 applies "irrespective of whether a household has children." *Id.* at 33a-34a. It also held that the content-neutrality of Section 504 made it less restrictive of First Amendment interests than Section 505. Although the Justice Department had submitted evidence that few subscribers had availed themselves of Section 504, the court noted that "the finding of minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." *Id.* at 36a. "Indeed," the court concluded, "the Government has not convinced us that it is a pervasive problem."¹¹ Accordingly, the district court permanently enjoined the government from enforcing Section 505 by its Order dated December 29, 1999.

5. On January 12, 1999, the government filed motions pursuant to Rule 59(e) of the Federal Rules of Civil Procedure seeking to alter or amend the judgment to limit the injunction to Playboy, and Rule 60(a) seeking to correct the judgment by including the "adequate notice" requirement within the mandate. Appellants filed a notice of appeal from the district court's decision and injunction order one week later, on January 19, 1999, while the motions to alter and correct the judgment were still pending. The district court dismissed the Rule 59(e) and 60(a) motions on March 18, 1999, holding that it lacked jurisdiction to consider them. J.S. App. 91a-92a. Appellants filed a further notice of

¹¹J.S. App. 36a. The court found that cable operators communicate the availability of channel blocking through a variety of means, including monthly billing inserts, special mailings, barker channels, and adult channel advertisements, *id.* at 20a, but said that it "is not clear" that such notices of the provisions of Section 504 have been adequate, *id.* at 36a. Accordingly, the court directed Playboy to ensure that cable operators provide their customers with "adequate notice" of Section 504. *Id.* at 38a.

appeal on April 7, 1999, seeking review of both the December 1998 and March 1999 Orders of the district court.

SUMMARY OF THE ARGUMENT

The district court correctly held that Section 505 violates the First Amendment because it significantly restricts protected speech without employing the least restrictive means of regulation and because the government failed to prove that its stated interests are real and not conjectural. Specifically, the district court found that:

- Section 505 imposes a content-based restriction on constitutionally protected speech that effectively imposes a ban on adult cable networks for two-thirds of the broadcast day in the vast majority of cable systems. J.S. App. 33a.
- Although the purpose of Section 505 is solely to protect children, the law significantly restricts speech in all U.S. households, including the two-thirds of all homes that do not have children under 18. J.S. App. 34a.
- The "problem" of signal bleed was never established in the legislative history, which the court below described as "an absolute void." M.A. App. 15a. Nor was the problem demonstrated after two years of litigation involving extensive expert testimony. J.S. App. 11a-12a.
- Less restrictive means are adequate to address the phenomenon of signal bleed. In particular, Section 504 of the Act, which enables any customer to obtain a blocking device for any network without charge, is a content-neutral solution that is tailored to the households that need it. J.S. App. 38a.

In the face of these findings, the government now asks this Court to reverse the decision below by making sweeping changes in its First Amendment jurisprudence to permit a greater "degree of flexibility in governmental regulation." Appellants' Br. 22. Specifically, Appellants ask this Court:

- To apply the standard for the regulation of "indecentcy" on free over-the-air broadcast television to cable television operators despite this Court's recent rejection of the government's effort to apply the broadcast standard to cable leased access channels.
- To approve regulations that would reduce the adult population to only what is fit for a child in most television households for most of the broadcast day in order to serve an "independent interest" in protecting children from indecentcy, even where parents are fully capable of doing so without restricting others' speech.
- To preclude reviewing courts from contemplating potentially less burdensome measures if such alternatives have not already been adopted and litigated, and to subject the government's "predictive judgments" under the least restrictive means test only to rational basis review.

None of the government's arguments for expanding its authority over protected speech has merit.

I. The significant restriction Section 505 imposes on Playboy's speech violates the well-established principle that a governmental interest in preventing access by children to sexually-oriented materials does not justify an unnecessarily broad suppression of speech addressed to adults. The government understands this fact, and even acknowledges that "a similar content-based restriction on non-obscene speech would surely be unconstitutional in many other contexts." Appellants' Br. 19. Yet it would have this Court approve a content-based restriction here by undermining established First Amendment law.

The government's primary argument is to ask this Court to extend the standard applicable to broadcast indecentcy to cable television. But this Court in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) ("*Denver*"), recently refused to do what the government now proposes, and for good reason. Appellants ignore the

historical differences in broadcast and cable regulation, the technical distinctions between the two media and the amplified censorial effect of time channeling in the cable television context. Such regulation has not previously been applied to cable programming, largely because cable allowed individual subscribers through existing technology to exert greater control over programming that comes into the home, where broadcasting did not. In addition, the restriction on speech imposed by time channeling is far greater for cable television because it restricts entire networks, as compared to that for broadcasting, where enforcement affects only the scheduling of a particular program. Because of the inherent vagueness of the indecency standard, aggravated by the particular mandate of Section 505 and the FCC's steadfast refusal to clarify the law, cable operators had no practical choice but to censor all of Playboy's programming during non-safe harbor hours. The government's attempt to extend *Pacifica* to newer media, if successful, would have wide-ranging chilling effects, and would undermine the logic of this Court's recent decision in *Reno v. ACLU*, 521 U.S. 844 (1997).

On the other hand, the district court's decision to strike down Section 505 is fully supported by this Court's decision in *Denver*, regardless of whether the level of review is characterized as strict or intermediate scrutiny. *Denver* upheld only a permissive regulation that expanded cable operators' editorial discretion, while striking down mandatory controls that impeded – but did not ban – adult access to “indecent” speech. The same reasoning compels the conclusion that Section 505 is unconstitutional. Moreover, the record below confirms the government's failure to demonstrate that the recited harms of signal bleed are real and not merely conjectural.

In addition, Section 505 is invalid because it does not provide the least restrictive means of addressing the government's concerns. Section 504 provides a content-neutral alternative that is tailored to those households that actually experience signal bleed, and that the government agrees is effective in stopping the phenomenon when used. Appellants' contentions that too many

parents are “distracted” to make Section 504 an adequate alternative, and that it is somehow inappropriate for a reviewing court to consider “hypothetical” alternative regulations, were considered and rejected by this Court in *Denver*. Moreover, the argument that it is acceptable to censor programming in all households in a community because some parents fail to use readily available measures to protect their children is antithetical to the rule that the government cannot reduce the adult population to viewing only what is fit for a child. The government's further claim that an “enhanced” Section 504 is equally as restrictive as Section 505 overlooks its failure to demonstrate the pervasiveness of signal bleed, and vastly overstates the cost of compliance with Section 504. Section 505 is inherently more restrictive in a constitutional sense because it is content-based and indiscriminately restricts speech in all households. In any event, the real question is not whether Section 504 may be more restrictive than Section 505; it is whether Section 504, standing alone, is more restrictive than Sections 504 and 505 together.

II. The district court correctly held that it lacked jurisdiction to consider the government's post-trial motions to modify the judgment because the filing of the notice of appeal terminated the lower court's jurisdiction. The government was not required to file its notice of appeal while its post-trial motions were pending, but its decision to do so carries jurisdictional consequences. Where, as here, the post-trial motions go to the heart of the constitutional controversy, it would be improper for the district court to retain jurisdiction after the appeal is noticed. The government's complaint about an ambiguity in this Court's appellate rules does not justify reversing the decision below, and would be more effectively addressed by asking this Court to modify its rules.

ARGUMENT

I. SECTION 505 VIOLATES THE FIRST AMENDMENT

A. As Playboy Predicted, Enforcement of Section 505 Significantly Restricted the Availability of Its Programming to Adult Viewers

Despite its initial uncertainty about the censorial impact of Section 505, after the trial on the merits the district court found that "[t]he restrictiveness of § 505 is now evident." J.S. App. 33a. As Playboy had predicted, "the practical impact of § 505 [was] to reduce the broadcast day for sexually explicit programming to an eight-hour safe harbor period of 10:00 p.m. to 6:00 a.m." J.S. App. at 17a & n.14. The evidence showed that the system-wide technical requirements of Section 505(a) were impractical.¹² Accordingly, the district court found that "most MSOs ha[d] no practical choice" but to time channel under Section 505(b) and thereby "curtail such programming during the other sixteen hours or risk the penalties imposed by the [law] if any audio or video signal bleed occurs during these times."¹³

As the district court found, these widespread cutbacks significantly "diminishe[d] Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech" because time channeling results in "the removal of all sexually

¹²The district court found that such measures would have required operators to "overhaul[] the[ir] transmission[s] * * * such as through a systematic switch to digital transmission, or by providing channel-mapping converter boxes to all subscribers" to achieve "system-wide blocking." J.S. App. 33a n.23. Such solutions, which would cost in excess of \$1 billion, are not economically feasible to implement Section 505. Pl. Ex. 60.

¹³J.S. App. 17a (emphasis added). Cable operators are extremely unlikely to take any chances with possible allegations of noncompliance since the Communications Act contains criminal penalties for willful violations. 47 U.S.C. § 501. Particularly relevant here, the Justice Department has in the past subjected a complaint about "incompletely scrambled indecent or obscene material" to criminal investigation by both the Criminal Division and the FBI. Pl. Ex. 245.

explicit programming at issue during two-thirds of the broadcast day from all households on a cable system." J.S. App. 33a. Before Section 505 was adopted, the buy rate for Playboy TV increased by an average of 40 percent in cable systems that expanded service from 10 to 24 hours per day. See Pl. Ex. 1 ¶ 26. The overall buy rate for Playboy, which had been growing during the 18 months before the law was adopted, significantly declined after Section 505 was implemented. Trial Tr. 26-28. Consistent with this experience, the court found the restriction imposed by the law was extensive since "30-50% of all adult programming is viewed by households prior to 10 p.m." J.S. App. 33a. The across-the-board cutbacks imposed by Section 505 are particularly excessive because they apply "irrespective of whether a household has children," and because the district court found that "two-thirds of all households in the United States have no children." *Id.* at 34a.

The government's current argument that the burden on speech "is not great," Appellants' Br. 24, is nothing more than an attempt to describe the video bookshelf as half full, rather than half empty. Its offhand defense that "one half or more of appellee's viewers watch during the safe harbor hours anyway" treats cavalierly the district court's finding that, as a general rule, up to 50 percent of Playboy's viewers are affected by time channeling, and ignores entirely the fact that, in some communities, the number exceeds 50 percent.¹⁴ The government's attempt to minimize the impact by suggesting that the average pay-per-view customer purchases programming only five times per year fails to disclose that nearly 25 percent of all cable addressable households are purchasers of adult programming. Pl. Ex. 219. And its argument that subscribers may use their VCRs to tape programming and watch it "whenever they wish," Appellants' Br. 28, does not take into account the impulse nature of pay-per-view purchases or explain the actual

¹⁴When service hours for Spice were reduced to the safe harbor hours in San Diego, for example, the buy rate plummeted by almost two-thirds. Trial Tr. 42-44; see also Pl. Ex. 4 (Harron Communications estimated losses of from 50 to 56 percent due to time channeling).

loss of viewing opportunities that occurred during the enforcement of Section 505.¹⁵ Based on this experience, Playboy estimated that it would lose approximately \$25 million in revenues. Trial Tr. 174. This loss provides one quantitative measure of the lost First Amendment opportunities caused by Section 505.

These restrictions on speech are especially broad in relation to the problem the government is seeking to address. Television may be considered a "pervasive" medium, but the government never demonstrated that signal bleed is a pervasive problem. J.S. App. 36a. The extent to which any particular household may experience signal bleed varies significantly from one cable system to another, and even from household to household within a system. J.S. App. 9a, 51a. Yet the government failed either to quantify the extent of the problem or even to portray accurately its qualitative variations.¹⁶ Even in cable systems that may be susceptible to signal bleed, the industry has responded with a variety of market-based non-regulatory solutions, including channel mapping converters, wiring configurations to prevent

¹⁵Nearly 90 percent of pay-per-view purchases of adult programming are made on impulse. Pl. Ex. 225; Trial Tr. 30. As a result, notwithstanding the existence of VCRs in most homes, Playboy's buy rate declined significantly when Section 505 was in effect.

¹⁶As the record demonstrates, not all signal bleed is created equal. The government's expert on the psychological impact of signal bleed agreed that any harmful effects from exposure would depend on the degree to which images and sounds were understandable. Benedek Dep. Tr. 201. Yet that expert based her entire assessment of the nature and impact of signal bleed on a single exhibit - Defendants' Exhibit 1 - handpicked by government lawyers and which lasted a total of 3 minutes, 44 seconds. Trial Tr. 551. However, when she was shown the other examples of signal bleed in the record - Defendants' Exhibits 3 and 4 - Dr. Benedek did not perceive any problems. After viewing Defendants' Exhibit 4, she testified that she could not tell whether it depicted sexual activity at all and there was no sound that a child could consider unpleasant. *Id.* at 555. Similarly, upon viewing Defendants' Exhibit 3, Dr. Benedek acknowledged that she could not discern what actions were taking place and that she had no idea how a child might interpret the signal. *Id.* She could detect no profanity on either tape. *Id.* at 556. Here, just as it did in the court below, the government sought to define the nature of signal bleed by lodging only Exhibit 1 with this Court, but not Exhibits 3 or 4.

signal bleed, and responsive industry policies. In addition, many televisions and VCRs already have built-in child-lock circuitry that, according to the government's own experts, allows parents or others to lock out the audio and video of any channel, thereby preventing signal bleed. Jackson Dep. Tr. 135-137, 155-157.

The government seeks to discount the impact of such technical measures, and asserts erroneously that the district court relied only on Section 504, "rather than any of those methods, as a less restrictive alternative to Section 505." Appellants' Br. 35 n.25. But such technical solutions are not "regulatory measures." Rather, the district court pointed out that the Appellants' failure to account for market-based solutions was "an underlying problem with the Government's analysis" and, as a result, "the Government presented no evidence on the number of households actually exposed to signal bleed and thus has not quantified the actual extent of the problem of signal bleed." J.S. App. 11a. Thus, after two years of litigation involving extensive discovery and two full hearings with extensive expert testimony, the district court concluded that "the Government has not convinced us that [signal bleed] is a pervasive problem." *Id.* at 36a.

Finally, to whatever extent signal bleed is a current problem, the government agrees that it will be eliminated by the transition to more technically sophisticated delivery systems, including digital transmission. Although the transition will not occur in time to prevent the significant First Amendment loss to Playboy and its subscribers as found by the district court, J.S. App. 18a & n.17, both sides agree that Section 505 eventually will be rendered entirely unnecessary by the unregulated evolution of the cable industry.¹⁷ Nevertheless, Section 505 imposes a widespread restriction on speech to address a problem that is far from universal and that will vanish over time.

¹⁷Playboy agrees with the government that signal bleed does not occur in totally digital systems, but notes the district court's finding that a "considerable percentage of cable systems will remain 'analog only' over the next ten years." J.S. App. 18a n.17.

B. Section 505's Restrictions on Playboy's Programming Violate the First Amendment

The broad restrictions of Section 505 are plainly inconsistent with this Court's decisions that non-obscene sexual expression is protected by the First Amendment and the governmental interest in preventing access by children to such materials "does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno v. ACLU*, 521 U.S. at 874-875; *Denver*, 518 U.S. at 754-756. Although the government asserts that restricting communication between adults "may be constitutional if necessary to serve the compelling interest in protecting minors," Appellants' Br. 25, no precedents support the wholesale cutbacks associated with Section 505.

In the various contexts in which the government regulates access to sexually-oriented materials, courts have upheld only those laws that impose "a relatively light burden."¹⁸ Thus, in a bookstore, the government may require posting and enforcing a store policy that keeps minors from openly reading adult materials, or keeping such materials on a shelf "within sight of the bookseller," *American Booksellers Ass'n*, 372 S.E.2d at 625, but is precluded from imposing more onerous business regulations, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), such as limits on the amount of floor space that can be occupied by adult materials, e.g., *U.S. Sound & Serv., Inc. v. Township of Brick*, 126 F.3d 555, 560 (3d Cir. 1997). Similarly, with adult telephone services, courts have upheld such measures as requiring adults to use a credit card to obtain access,¹⁹ but have rejected regulations

¹⁸*Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 625 (Va. 1988); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 388-389 (1988).

¹⁹*Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129-130 (1989) (government must employ least restrictive means). Thus, where FCC rules block in advance access to a "dial-a-porn" service if it is billed by the telephone company, immediate access is permitted by credit card. *Information Providers' Coalition for Defense of First Amendment v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991); see also *id.* at 878 ("[r]eceipt of uttered expression is provided immediately upon request"); *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d

that imposed more burdensome restrictions that would "act as a deterrent" to potential callers who might use the service "on impulse" or "infrequently."²⁰ And in the context presented here, cable television, this Court has upheld "permissive" regulations that expanded the editorial control of cable operators, *Denver*, 518 U.S. at 750 (plurality op.), but struck down mandatory controls that added "costs and burdens" for the operators, thus "prevent[ing] programmers from broadcasting to viewers who select programs day by day (or, through 'surfing,' minute by minute)," and restricting "viewers who would like occasionally to watch a few, but not many, of the programs on the 'patently offensive' channel." *Id.* at 754.

None of the cases support the type of broad restrictions on speech found to have resulted from Section 505. This is true despite the government's claim that Section 505 is not directed at "the speech itself," but at a "byproduct" or "secondary effect" of speech. Appellants' Br. 22-23. The district court fully considered this argument at each stage of the litigation below, and found that full First Amendment scrutiny applies to Section 505 because it targets channels solely on the basis of their content. J.S. App. 25a ("Signal bleed from the Disney Channel, for example, does not come within the purview of the statute.").²¹

1535, 1543 (2d Cir. 1991) (rules impose "no restraint of any kind on adults who seek access").

²⁰*Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 786-787 (3d Cir. 1990); *Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 855-857 (2d Cir. 1986) ("*Carlin II*"); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121-122 (2d Cir. 1984) ("*Carlin I*") (dial-a-porn rules including "safe harbor" provision struck down).

²¹The government continues to rely on the district court's brief reference to "secondary effects" from the preliminary injunction decision, see Appellants' Br. 22-23, while ignoring entirely the Court's more complete discussion of the issue after all of the evidence was presented. J.S. App. 24a-25a. While the government understandably might prefer the outcome at the earlier stage of the proceedings where it prevailed, its persistence in relying on preliminary findings is at odds with its prior representation to this Court that further findings at the permanent injunction stage would enable the district court to better evaluate the merits of the

This Court repeatedly has rejected similar efforts to mischaracterize direct restrictions on speech as regulations of "secondary effects." See *Reno v. ACLU*, 521 U.S. at 867 (rejecting government characterization of speech regulations as "cyberzoning" subject to "secondary effects" analysis under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50 (1986)); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("Regulations that focus on the direct impact of speech on its audience * * * are not the type of 'secondary effects' we referred to in *Renton*."). It is settled law that the First Amendment prevents the government from restricting the circulation of speech simply because its "byproducts" can cause some type of "nuisance." See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) (possibility of littering does not justify restriction on the distribution of handbills). This is particularly true where, as here, the intensity of the regulation is inextricably bound to speech content. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (government cannot impose variable financial burden on public demonstration based on evaluation of threatening content). For example, the government could not regulate sound levels at an outdoor concert based upon its distaste for a particular type of music. *Ward v. Rock Against Racism*, 491 U.S. 781, 791-793, 795 & n.5 (1989). Nor can it impose a content-based regulation of signal bleed and be immune from traditional First Amendment scrutiny.

This Court's decision in *Erznoznik v. City of Jacksonville* 422 U.S. 205 (1975) is directly on point. There, this Court struck down a local ordinance designed to protect children from "fleeting * * * glimpses of nudity" that could be seen from public streets when X-rated movies were shown at drive-in theaters. *Id.* at 214-215. Like Section 505, the ordinance at issue in *Erznoznik* targeted inadvertent viewing of bits and pieces of movies, and it subjected drive-in owners to essentially the same dilemma created

case. Mot. to Affirm at 12, 14-16, *Playboy Entertainment Group, Inc. v. United States*, No. 96-1034 (U.S. 1997).

for cable operators here: "they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Id.* at 217. This Court held that the law imposed too great a burden under the First Amendment because it would "increase the cost of showing films containing nudity."²² Such a burden, the Court concluded, is an unconstitutional "restraint on free expression" even if "it might not result in total suppression of these movies." *Id.* at 211 n.8; see also *Rabe v. Washington*, 405 U.S. 313, 314 (1972) (*per curiam*) (striking down ordinance restricting drive-in that presented films with "sexually frank scenes" that were clearly visible from private residences). Rather, the regulation was found to be excessive because it created a "deterrent effect" on speech. *Erznoznik*, 422 U.S. at 217.

In short, this Court has never upheld the types of broad restrictions on speech that are associated with Section 505. The government understands this fact, and even acknowledges that "a similar content-based restriction on non-obscene speech would surely be unconstitutional in many other contexts." Appellants' Br. 19. Accordingly, Appellants ask this Court to eviscerate the applicable level of First Amendment scrutiny in order to overturn the decision below. But as explained herein, it cannot justify such a sweeping change in the law.

²²*Id.* at 211. The government does not dispute the relevance of *Erznoznik*, but attempts instead to distinguish the Jacksonville ordinance by claiming that it applied to a broader category of speech than does Section 505. But the claim that Section 505 "is directed solely at sexually explicit programs broadcast on sexually explicit programming services," Appellants' Br. 23 n.14, is undermined by the actual language of Section 505 ("channels primarily dedicated to sexually-oriented programming") as well as the imprecision and vagueness of the indecency standard. See *infra* pp. 26-30. Moreover, a contemporaneous reference to *Erznoznik* written by the Meese Commission's legal expert described the Jacksonville ordinance as a "requirement that drive-in theaters 'shield' passersby from adult or X-rated movies but not from others." See Frederick F. Schauer, *THE LAW OF OBSCENITY* 94-95 (BNA 1976).

1. *Pacifica* Does Not Provide the Appropriate Standard of Review

The heart of the government's argument is to ask this Court to do precisely what it refused to do in *Denver* — to extend the standard applicable to broadcast indecency to cable television. Although the *Denver* plurality compared broadcasting and cable television and found that both media are "pervasive," 518 U.S. at 744-745, it expressly declined the government's invitation to apply the holding from *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to cable television.²³ Here, the government asks this Court to consider the "all-important context" and to apply *Pacifica* directly to cable, yet it utterly ignores the historical differences in broadcast and cable regulation, the technical distinctions between the two media, and the amplified censorial effect of time channeling in the cable context. As this Court explained in *Reno v. ACLU*, *Pacifica* involved a single order issued by the FCC which "had been regulating radio stations for decades," and "targeted a specific broadcast" that "represented a rather dramatic departure from traditional program content." 521 U.S. at 867. This case, however, arises in a very different context.

a. Contrary to the government's assertions, *Pacifica* is a most limited holding. This Court upheld only the government's ability to subject a particular broadcast to subsequent review, and emphatically declined to authorize the FCC "to edit proposed broadcasts in advance and to excise material considered

²³*Denver*, 518 U.S. at 755 (plurality op.). The government's startling assertion that "[n]one of the opinions in *Denver Area* suggested that regulation of indecency on cable television should be analyzed under a standard that differs in any way from the standards governing regulation of indecency on over-the-air broadcast television and radio," Appellants' Br. 20, is contradicted on the same page of its own brief, *id.* at 20 n.10 (discussing Justice Kennedy's endorsement of strict scrutiny standard), and by the various *Denver* opinions, e.g., 518 U.S. at 803-804 (Kennedy, J., concurring in part, dissenting in part) (concerns articulated in *Pacifica* "do not justify . . . a blanket rule of lesser protection for indecent speech"), 812-819 (Thomas, J., concurring in judgment in part and dissenting in part) (discussing application of full First Amendment protection to cable television).

inappropriate for the airwaves." 438 U.S. at 735-738. The ruling applied only to the "specific factual context" presented by the FCC's order — whether the Commission had the authority "to proscribe this particular broadcast," *id.* at 742 (internal quotation marks omitted), and this Court expressly limited its holding to approve only the "subsequent review" of the particular words at issue. *Id.* at 737.

Applying the *Pacifica* standard to cable television would drastically increase the level of government regulation of this medium, which has never previously been subject to the same degree of FCC control as broadcasting.²⁴ Whereas *Pacifica* involved programming that represented "a dramatic departure from traditional program content," applying broadcast-type indecency rules to cable television would extend regulation of programming to content that has always been available on this medium.²⁵ Traditional cable television fare is even more distinguishable from broadcast content because of the existence of government-mandated leased and public access channels, which may present indecent material to all cable subscribers on the basic

²⁴See, e.g., *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1116 (D. Utah 1985) (cable indecency law targeting premium movie services invalidated), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415, 1419 n.4 (11th Cir. 1985) (same).

²⁵Final Report, The Attorney General's Commission on Pornography 282 (1986) ("MEESE COMMISSION REPORT") (the increased sexual explicitness of cable television compared to broadcasting occurs in talk shows, call-in shows specializing in sexual advice, music videos featuring strong sexual or violent themes, cable channels that specialize in sexual fare, and more general purpose cable channels that offer uncut motion pictures that would not be shown on broadcast television). In one review of over 1,300 movies during a three year period, the FCC found that more than half of the films on general premium cable services received an MPAA R rating. *Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5308-5309 (1990). Although the R rating obviously is not a legal standard, the FCC has used it as a general rule of thumb. See *id.* ("adults can obtain indecent material through cable television" because "a significant number of R-rated movies are shown on cable").

service tier.²⁶ Consequently, *Pacifica*-style regulation is far more restrictive (and, as explained below, less effective) when applied to the cable television medium.²⁷

In seeking to apply *Pacifica* wholesale to cable television, the government also ignores important technical distinctions between the broadcast and cable media. The broadcasting "safe harbor" rules historically were based on the fact that blocking technology did not exist for radio or for free television.²⁸ As the Solicitor General told this Court in *Denver*, Congress employed a safe harbor approach for broadcasting "because it is technologically impracticable (at least at present) to implement a central office 'blocking' scheme to screen indecent programming on existing television sets and radios." Brief of Fed. Resp'ts at 40 n.20, *Denver*. Accordingly, any First Amendment burdens resulting from the broadcasting safe harbor were more easily justified in that specific context because there was no other way to address the government's concern.²⁹

²⁶*Denver*, 518 U.S. at 752-753; *Loce v. Time Warner Entertainment*, 1999 WL 387150, at *8 (2d Cir. June 14, 1999); *Goldstein v. Manhattan Cable Television, Inc.*, 916 F. Supp. 262, 267 (S.D.N.Y. 1995).

²⁷Because sexually-oriented material can and does appear on a broad range of cable networks, Section 505 also violates the Equal Protection Clause of the Fifth Amendment. See *Action for Children's Television v. FCC*, 58 F.3d 654, 668-669 (D.C. Cir. 1995) (en banc) (invalidating different safe harbor hours for public broadcasters), cert. denied, 516 U.S. 1043 (1996). Playboy raised this issue with the court below. See Pl. Post-Trial Br. at 74-77.

²⁸See *Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5309 (separating children from adults in the broadcast audience is an "impossibility"), *id.* at 5305 ("parents' control of children's television viewing * * * differs from parental control of cable viewing"), at 5308 ("[w]hile signal blocking and subcarrier use appear to be technologically feasible to prevent reception by individuals not wishing to receive certain signals, neither is available today" for broadcasting); see *Denver*, 518 U.S. at 775 (Souter, J., concurring) ("broadcasts [are] * * * difficult or impossible to control without immediate supervision").

²⁹By increasing parental control over broadcasting, the V-chip requirements of the Telecommunications Act may now eliminate this rationale for applying time channeling restrictions on free over-the-air television.

With cable television, however, reviewing courts, including this Court, have noted that various technical options are available to permit control of cable programming into the home. *Denver*, 518 U.S. at 755-757 (discussing less restrictive technical alternatives, including the possibility of adding informational requirements); *Cruz*, 755 F.2d at 1420-21 (discussing lockboxes). Ironically, the government previously has taken the position that such technical options are less restrictive than time channeling. Brief of Fed. Resp'ts at 40-41, *Denver* (noting relative First Amendment burdens "[w]here technology permits a choice between mandatory time-of-day restrictions and a technique that permits 24-hour access").

b. Unlike the single enforcement order at issue in *Pacifica* that "targeted a specific broadcast," *Reno*, 521 U.S. at 867, Section 505 targets "channels" for wholesale service cutbacks. When safe harbor rules are applied to broadcasters, the affected station may comply by rescheduling a particular program to late night hours. But here, the district court found that the affected networks had "no practical choice" but to go dark for 16 hours per day. J.S. App. 17a. This is a fundamental breach of the basic principle that "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone * * *."³⁰ A blanket rule "chills potential speech before it happens" and imposes a far greater First Amendment burden than "an isolated disciplinary action." *United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995).

The government asserts, however, that Section 505 requires time channeling or blocking "only of indecent material" and that the fact that Playboy's programming is restricted for two-thirds of the broadcast day "is the result of appellee's choice to broadcast only indecent material." Br. in Opp. to Mot. to Affirm at 3-4. This

³⁰*Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 683 (1994) (O'Connor, J., concurring in part and dissenting in part) (citation omitted) ("*Turner I*"); see *Wilkinson*, 611 F. Supp. at 1110 (impact of indecency time channeling is far more burdensome for cable network than for broadcast station).

facile argument ignores the fact that, unlike broadcasting, cable television networks generally are offered as niche services defined by subject matter, and it highlights a fundamental flaw in Section 505 – the presumption it creates that all programming on a “sexually-oriented” channel is necessarily “indecent.” As demonstrated throughout this litigation, this broad supposition, coupled with the lack of precision of the indecency standard, leads to the censorship of programming that clearly is not indecent, and precludes any attempt by Playboy to minimize the censorial effect of time channeling.

As Playboy demonstrated below,³¹ the indecency standard used in Section 505 suffers from the same infirmities identified by this Court in *Reno v. ACLU*. In *Reno*, the identical indecency standard that is now employed in Section 505 was found to be seriously deficient due to “the absence of a definition of either [statutory] term,” the lack of any requirement that the proscribed material be “specifically defined by the applicable * * * law” or that the material be without “serious literary, artistic, political, or scientific value.”³² This Court was troubled by the scope of the indecency restriction because it applied to “any of the seven ‘dirty words’ used in the *Pacifica* monologue” and could also extend to discussions about “safe sexual practices [and] artistic images that include nude subjects.”³³

³¹See Playboy’s Mot. for Summ. J. on Vagueness at 4-19; Playboy’s Post-Trial Br. at 34-52.

³²521 U.S. at 871-873 (internal quotation marks omitted). This Court pointed out that the term indecent “does not benefit from any textual embellishment at all,” and the term patently offensive “is qualified only to the extent that it involves ‘sexual or excretory activities or organs’ taken ‘in context’ and ‘measured by contemporary community standards.’” *Id.* at 871 & n.35 (citations omitted).

³³521 U.S. at 878. This Court also found that a speaker could not confidently assume “that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the [law].” *Id.* at 871.

Section 505 has the same flaws, plus a few more. After briefing and argument on the vagueness issue, the district court below reserved judgment, but noted its particular concern “about the uncertainty which continues to surround the restrictions on programming on channels primarily dedicated to sexually-oriented programming during the non-safe harbor hours, presently the hours from 6:00 a.m. to 10:00 p.m.” M.A. App. 24a. It also pointed to the “fundamental uncertainty surrounding the question of how a channel primarily dedicated to sexually-oriented programming during safe harbor hours would be classified if it opted to air an alternative type of programming during non-safe harbor hours.” *Id.* at 25a. In particular, the district court asked whether there are “any FCC letter or advisory opinions that are available to assist this Court, the plaintiff, or other channels * * * in construing the permissible scope of regulation under Section 505.” *Id.* at 25a n.6.

Notwithstanding the district court’s concerns, the FCC rejected Playboy’s efforts to get specific guidance on the meaning of the indecency standard in Section 505. It rejected Playboy’s request for clarification, including a request for an expedited ruling to clarify the status of a safe sex documentary that premiered on World AIDS Day in December 1997.³⁴ In a one-page letter, issued long after World AIDS Day came and went, the Chief of the Cable Services Bureau wrote that “declaratory rulings related to programming issues must be dealt with cautiously” and “have the potential to be viewed as prior restraints.” M.A. App. 28a-29a.

Notwithstanding the FCC’s professed caution, the government in the court below did not hesitate to declare all of Playboy’s

³⁴Along with its request for a declaratory ruling on nine videos, Playboy sought an expedited ruling for the safe sex program *Doin’ it Right* in the hope of transmitting it outside the safe harbor hours to make it available to as many cable subscribers as possible. When no ruling was forthcoming, however, the program aired after 10 p.m. Trial Tr. 117-118.

programming to be "indecent."³⁵ In particular, the government argued that AIDS awareness programs on Playboy TV should be restricted because they contained "crude and explicit language" and some "explicit" demonstrations. Defs. Post-Trial Br. at 68-69. It also argued that news magazine-type programs should be restricted because they generally are sexually-oriented, use some of George Carlin's "filthy words" in some segments, and include some segments with sexual activity. *Id.* at 67-68. And the government argued that nude images in the *Video Playmate Calendar* are indecent despite the absence of any sexual activity. *Id.* at 68.

In short, the government's actions in this case substantiate this Court's concerns that the indecency standard fails to account for the merit of a particular program and does not consider the work as a whole. In *Reno*, for example, this Court noted that a vague indecency standard threatened to restrict safer sex instructions "written in street language so that the teenage receiver can understand them," 521 U.S. at 870-871, 878, which is exactly what occurred here.³⁶ Similarly, the government's willingness to condemn news programs that included intermittent, fleeting images of sexual activity or profanity confirmed its failure to consider the work as a whole.³⁷ And its tendency to equate "nudity" with "indecency" undermines its argument that Section 505 is narrowly focused on "sexually explicit programs" and is

³⁵ *Amici Family Research Council, et al.*, embrace the government's position and state that Section 505 should restrict Playboy's speech "regardless of whether the 'sexually explicit' material is medical, scientific, critically important, or mere entertainment in nature." Brief of *Amici Family Research Council, et al.*, at 5.

³⁶ Contrary to the government's refusal to issue a declaratory ruling and its claims that Playboy's AIDS education programs should be considered indecent under Section 505, the First Circuit held that Playboy's program *Hot, Sexy and Safer* was appropriate for a mandatory middle school assembly because it was "intended to educate the students about the AIDS virus." *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 541 (1st Cir. 1995).

³⁷ See, e.g., Defs. Ex. 41 (*World of Playboy*, in which only two of twelve news segments had any depictions of sexual activity).

contrary to well established law.³⁸ Finally, the government's discussion of the theatrical features contained in Playboy's declaratory ruling request underscores the concerns raised by the district court in *Reno* that the indecency standard restricts "a broad range of material" including "contemporary films" such as "*Leaving Las Vegas*."³⁹

Although the district court did not resolve the vagueness issue, J.S. App. 23a, 39a, it implicitly rejected the government's claim that "Playboy can offer non-indecency programs 'in the clear' whenever it wishes during the non-safe harbor period." Reply Br. in Support of Defs.' Mot. for Partial Summ. J. at 12. The court found that cable operators have "no practical choice" under Section 505 but to censor Playboy TV for two-thirds of the broadcast day, J.S. App. 17a, and that "the MSOs have unanimously chosen to stop *all* such programming on dedicated adult channels during the non-safe harbor hours." *Id.* at 33a n.23 (emphasis added). This finding undercuts the government's claim that time channeling is no more restrictive in this context than when it is applied to broadcast stations. And it also provides an

³⁸ *Erznoznik*, 422 U.S. at 213; *American Booksellers Ass'n*, 484 U.S. at 394; see also *ACLU v. Reno*, 24 Media L. Rep. (BNA) 1795, 1796-1797 & n.3 (E.D. Pa. May 15, 1996) (admonishing Justice Department for investigation of "centerfold-type images"). In contrast to the government's position here, the Department of Defense found that some of the same types of Playboy videos that were submitted to the FCC are not "sexually explicit" within the meaning of The Military Honor and Decency Act, 10 U.S.C. § 2489a (Supp. III 1998). It found that such videos as *Playboy 1995 Playmate Calendar* and various *Playboy Video Centerfolds* are not "sexually explicit." Twelve copies of the Pentagon's list of findings has been lodged with the Clerk of this Court.

³⁹ *ACLU v. Reno*, 929 F. Supp. 824, 855 (E.D. Pa. 1996) (Sloviter, J.). Although the government below argued that the theatrical releases included in Playboy's declaratory ruling request such as *9 1/2 Weeks* and the *Unbearable Lightness of Being* are not "typical or frequent fare" for Playboy, Defs. Post-Trial Br. at 68, such films have aired on Playboy TV and are sufficiently "typical" that Playboy uses *9 1/2 Weeks* as an example in its editorial guidelines. See Pl. Ex. 132. Of course, such programming can never become more typical or frequent under Section 505's vague standard.

independent basis for this Court to conclude that Section 505 is unconstitutional.⁴⁰

c. The government's assertion that the context of Section 505 provides an even greater justification for "flexibility in regulation," Appellants' Br. 22, is wrong both factually and as a matter of law. The claim that Section 505 is less restrictive than time channeling under *Pacifica* because cable operators may transmit adult programming "at any time of the day or night" with adequate scrambling simply is incorrect. Appellants' Br. 23-24. Broadcasters have exactly the same "option" as cable operators. Under the FCC's indecency rules, broadcast stations may transmit indecent programming during non-safe harbor hours "on encrypted services, such as subscription television" ("STV").⁴¹ However, STV is not an economically viable alternative means of complying with indecency rules, and it would be frivolous to suggest that any burdens on broadcast speech imposed by the rules could be avoided by switching to a subscription format.⁴² Likewise, the district court found that the system-wide scrambling alternative provided by Section 505(a) was not viable, and that "[n]either Playboy nor the government could identify a single

⁴⁰The question of Section 505's facial invalidity on grounds of overbreadth or vagueness is "fairly included" within the questions presented in this appeal. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992); see Appellants' Br. at I. Moreover, this Court may uphold a judgment on any ground raised in the court below "whether or not that ground was relied upon, rejected, or even considered by the District Court or Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

⁴¹*Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5308. Contrary to the government's suggestion, in fact, Section 505 is more restrictive for cable operators with respect to scrambling because its requirements extend only to "multichannel video programming distributor[s]." 47 U.S.C. § 561(a). No comparable rule applies to STV.

⁴²STV has been a marketplace failure. At its peak, around 1982, the service had about 1.4 million subscribers, and its numbers steeply declined thereafter. BROADCASTING & CABLE YEARBOOK 1998, at xxviii. The current BROADCASTING & CABLE YEARBOOK lists no subscription operations among U.S. television stations. See *id.* § B.

cable system that had adopted double scrambling to comply with § 505." J.S. App. 16a-17a, 33a n.23. It is therefore incorrect to suggest that the possibility of scrambling lightens the load of Section 505.⁴³

Nor is there any basis in the record for the government's claim that the risks to children posed by signal bleed from Playboy's programming "are substantially greater than those present in *Pacifica*." Appellants' Br. 25. This argument, which depends on an overly generalized characterization of the programming at issue, overlooks the fact that the government failed to demonstrate that signal bleed is a "pervasive problem," J.S. App. 36a, either quantitatively or qualitatively. The district court noted the lack of evidence that "the effects of viewing signal bleed of sexually explicit television are the same as viewing sexually explicit television outright." J.S. App. 29a. In this regard, the FCC has suggested that concern over indecency is not present where the sexual import of material is "barely intelligible, much less inescapable to adults" so that those who randomly tune in would be unlikely to "continue listening" or unlikely to "discern the [material's] sexual meaning." *Sagittarius Broad. Corp.*, 7 FCC Rcd. 6873, 6874 (1992).

Even where signal bleed is more discernible, there is no record support for the government's assertion that the "sound tracks from appellee's programming alone are much coarser and far more offensive than the broadcast that was at issue in *Pacifica*." Appellants' Br. 30. With respect to the government's references to "assorted orgasmic moans and groans," Appellants' Br. 6 n.4, Judge Farnan described such audio signal bleed as "akin to the

⁴³The fact that certain cable operators already comply with the technical requirements of Section 505(a) does nothing to reduce the regulatory burden of the law, because those operators did not upgrade their systems to comply with government mandates. However, the government's suggestion of a forced migration of Playboy programming to a digital tier by operators who have commenced some digital service, Appellants' Br. 40-41, would significantly restrict the number of subscribers who could receive service for a number of years. Trial Tr. 166-167.

utterances of actress Meg Ryan during her performance in the diner scene in the movie *When Harry Met Sally*,” M.A. App. 17a n.11, and even the government’s expert witness testified that such sounds were no more “offensive” or “harmful” than sounds routinely emitted from other channels.⁴⁴ Nor is there any evidence in the record that the sound tracks of films routinely shown on other premium networks (that are not subject to Section 505) are any less “coarse” or “offensive.” See Pl. Ex. 18 at 2 (HBO film *Another 48 Hours* averages a profanity every 30 seconds).

Finally, it should be noted that granting the government’s request to apply *Pacifica* here would violate the *Denver* plurality’s decision to eschew adopting “a rigid single standard, good for now and for all future media and purposes.” 518 U.S. at 742 (plurality op.). The government is using this case as a vehicle to obtain “greater flexibility” to regulate protected speech in the cable television medium, a request that has far-reaching implications as some courts have begun to define high-speed Internet access as a cable television service, regulated under the Cable Act. See *AT&T Corp. v. City of Portland*, 43 F. Supp.2d 1146 (D. Ore. 1999), appeal pending, No. 99-35609 (9th Cir.). As Justice Souter wrote in *Denver*, the media of communication are becoming “less categorical and more protean,” and “as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.” *Denver*, 518 U.S. at 776-777 (Souter, J., concurring). Here, the government’s request that this Court expand *Pacifica*’s holding to newer media in circumstances far beyond its original context threatens to undermine the logic of *Reno v. ACLU*, 521 U.S. at 870 (“our cases provide no basis for

⁴⁴The government’s expert testified that any adverse effect of audio signal bleed is based on a child’s exposure to an “unpleasant sound,” not to anything related to sexuality. The sound could be an explosion, a gunshot, or a scream, and it would not matter what channel is on television. Trial Tr. 578-579.

qualifying the level of First Amendment scrutiny that should be applied to this medium”), and should be firmly rejected.

2. Section 505 is Unconstitutional Under the Level of Scrutiny This Court Applied in *Denver*

The district court correctly found Section 505 to be unconstitutional under the teachings of *Denver*, regardless of whether the First Amendment standard applied there is characterized as intermediate scrutiny or “strict scrutiny or something very close to strict scrutiny.”⁴⁵ There simply is no basis for the government’s complaint that the district court applied a “particularly rigorous” form of strict scrutiny. Appellants’ Br. 28. Quite to the contrary, just as this Court held in *Denver*, Section 505 “fails to satisfy this Court’s formulations of the First Amendment’s ‘strictest,’ as well as its somewhat less ‘strict,’ requirements.” *Denver*, 518 U.S. at 755; *id.* at 803-804 (Kennedy, J., concurring in part and dissenting in part).

a. Section 505 is plainly unconstitutional under *Denver*. Significantly, the only part of *Denver* to garner a solid majority was the section of the opinion invalidating Section 10(b) of the 1992 Cable Act, 518 U.S. at 753-760, a provision the government described below in this case as “remarkably similar to Section 505” and which was most often compared to Section 505 at the preliminary injunction stage.⁴⁶ Indeed, in its supplemental brief in *Denver*, the Solicitor General noted that Section 505 “has effects similar to Section 10(b) of the 1992 Cable Act.” Supplemental Br. of Fed. Resp’ts at 3, *Denver*.

⁴⁵ J.S. App. 23a. While the *Denver* plurality may not have applied strict scrutiny explicitly, the result in that case was reached by “closely scrutinizing” the law “with the greatest care.” 518 U.S. at 743 (Court must “closely scrutiniz[e]” the provisions of Section 10 to ensure that it does not impose “an unnecessarily great restriction on speech.”); *id.* at 747 (plurality op.) (“Our basic disagreement with Justice Kennedy is narrow.”).

⁴⁶ See Defs. Opp’n Br. to the Mot. for Prelim. Inj. at 2-3, 4, 14, 21, 23, 24, 25, 26, 33, 34, 37, 40, 41, 43, 54, 58, 63, 68, 71 (20 separate citations comparing Section 505 to Section 10(b)).

Moreover, the only regulation upheld in *Denver*, out of the three at issue, merely permitted cable operators to reject indecent programming on leased access channels. In sharp contrast to Section 505, Section 10(a) imposed no requirement at all on cable operators to restrict indecent programming,⁴⁷ and the vast majority of cable operators apparently adopted no such policy.⁴⁸ Instead, Section 10(a) *expanded* cable operators' editorial control over leased access channels because it empowered them for the first time to accept or reject indecent programs on those channels.⁴⁹ Moreover, unlike the governmental mandate imposed by Section 505, there is no possibility that the voluntary rules approved in *Denver* would be vague or overly broad, since cable operators themselves were given the authority to define what programming is "indecent." Such leased access requirements can only be enforced pursuant to a "written and published policy," *Denver*, 518 U.S. at 752 (plurality op.) (published policy requirement "protects against over broad application of its standards"), and must be applied consistently to "substantially similar programming," *id.* at 752-753; *see Loce*, 1999 WL

⁴⁷*Denver*, 518 U.S. at 750 (plurality op.) (Court approved only permissive controls on indecent leased access programming), 768 (Stevens, J., concurring) ("The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition."), 779 (O'Connor, J., concurring in part and dissenting in part) (Sections 10(a) and 10(c) leave to the cable operator the decision whether or not to broadcast indecent programming), 823 (Thomas, J., concurring in part and dissenting in part) ("The permissive nature of §§ 10(a) and (c) is important in this regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right * * * to compete for space on an operator's system.") (citation omitted).

⁴⁸*See Cable Television Consumer Protection & Competition Act of 1992*, 62 Fed. Reg. 28371, 28371 (1997) (only about 100 cable systems per year expected to adopt a written policy limiting indecency); *Denver*, 518 U.S. at 745 (plurality op.) ("[t]he permissive nature of § 10(a) means that it likely restricts speech less than, not more than, the ban at issue in *Pacifica*").

⁴⁹*Denver*, 518 U.S. at 743 (plurality op.) (provision involves a complex balance of First Amendment interests); *see also* Brief for Fed. Resp'ts at 25, *Denver* (the rules "limit programmers' expressive activity only insofar as – and to precisely the same extent as – they expand that of the operators").

387150, at *15 ("we see no indication that Congress meant to imply that a cable operator could reasonably believe any given program to be patently offensive solely because of its source"). Section 505's mandate is not remotely comparable to the sole provision upheld in *Denver*.

b. The district court's factual findings in this case amply reveal that the government failed to demonstrate "that the recited harms [to be addressed by Section 505] are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."⁵⁰ After two years of litigation involving extensive discovery and two full hearings with extensive expert testimony, the district court concluded that "the Government has not convinced us that [signal bleed] is a pervasive problem." J.S. App. 36a.

The legislative history provides no support for the government's position. Section 505 was adopted as an eleventh hour amendment to a comprehensive telecommunications bill without discussion, supported only by the sponsors' unadorned assertion that "numerous" cable systems failed entirely to scramble their signals on adult channels. *See* 141 Cong. Rec. S8167 (daily ed. June 12, 1995). There were no hearings, debates, or congressional findings before Congress voted on the amendment. J.S. App. 54a. Moreover, no testimony or other evidence ever suggested that children would be harmed in any way by occasional or fleeting exposure to garbled cable signals. When the district court granted the temporary restraining order in this case, it noted that "the legislative record contains no findings as to how often this bleeding occurs, how many minors are exposed to the adult programming when the bleeding occurs or what effect such

⁵⁰ *Turner I*, 512 U.S. at 664; *see Denver*, 518 U.S. at 766 (plurality op.) ("[i]n the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it"); *Reno*, 521 U.S. at 858 n.24 (noting the lack of legislative investigation preceding passage of the Communications Decency Act).

exposure has on minors." M.A. App. 15a-16a (noting "an absolute void of legislative findings").

The district court challenged the government to provide "more specific evidence of the number of households with the potential for signal bleed" at the hearing on a permanent injunction, J.S. App. at 53a & n.16, but no such showing was made, *id.* at 36a. Although this Court has approved the use of judicial proceedings to supplement the abstract concerns of Congress where the legislative history lacks sufficient findings, *Turner I*, 512 U.S. at 664-668, and narrowly upheld the constitutionality of must carry regulations after a comprehensive record was compiled on remand, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-196 (1997) ("*Turner II*"), the differences between the *Turner* cases and this case are quite telling:

- Must carry rules were enacted only after years of detailed study, *Turner I*, 512 U.S. at 632; *Turner II*, 520 U.S. at 199 (Congress heard "years of testimony, and review[ed] volumes of documentary evidence and studies"), whereas Section 505 was adopted despite an "absolute void" of legislative findings.
- The FCC conducted a "contemporaneous study" of television stations that had been dropped from cable systems to support must carry rules, *Turner II*, 520 U.S. at 203, whereas here, there was no study of any kind, and the government could identify only 72 specific complaints "which the FCC believes are at least potentially related to indecent or sexually explicit cable programming" out of "33,000 informal written complaints about cable service generally."⁵¹

⁵¹ Pl. Ex. 119. The 72 complaints did not all relate to "sexually-oriented" channels or to the issue of signal bleed, but to programming on networks as diverse as HBO, Cinemax, The Movie Channel, Showtime, MTV, E!, CNN, Bravo, The Disney Channel, Viewer's Choice, A&E and Nickelodeon. Pl. Ex. 43.

- In *Turner*, the legislative record in support of must carry rules was supplemented by an additional 18 months of factual development in the courts "yielding a record of tens of thousands of pages of evidence" that included congressional findings, expert submissions, sworn declarations, and industry documents. *Turner II*, 520 U.S. at 187 (internal quotation omitted). Here, however, after two years of litigation, the government presented "no evidence on the number of households actually exposed to signal bleed," and managed to compile anecdotal evidence comprising "only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting." J.S. App. 11a-12a.

Ultimately, the government's evidence in support of Section 505 amounted to accounts of two city councilors, 18 individuals, one United States Senator, and the officials of one city.⁵² In *Denver*, this Court found similar evidence to be inadequate to support restrictions on indecent programming on public access channels. Although the record contained "anecdotal references to what seem isolated instances of potentially indecent programming," the plurality found that "these few examples do not necessarily indicate a nationwide pattern." *Denver*, 518 U.S. at 764 (plurality op.). The *Denver* plurality concluded that "the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end." *Id.* at 766. The same conclusion is warranted here, where the government failed to show that signal bleed is a pervasive problem. See Richard Posner, *Obsession*, NEW REPUBLIC, Oct. 18, 1993, at 34 ("in a nation of 260 million people, anecdotes [to establish problems of pornography] are a weak form of evidence"). In addition, the government failed to demonstrate that imposing the "safe harbor" under Section 505 "will in fact

⁵² J.S. App. 11a. The paucity of examples is all the more impressive in light of the active participation of *Amici* in the drafting of this law, and in preparing viewer testimony for the preliminary hearing and trial. Br. of *Amici* Family Research Council, et al., at viii.

alleviate [the] harms [of signal bleed] in a direct and material way." *Turner I*, 512 U.S. at 664; *Denver*, 518 U.S. at 766 (plurality op.). See *infra* pp. 44-45.

c. As explained more fully in the next section, Section 505 is unconstitutional because it is not the least restrictive means of addressing the government's interest. Although this Court conducted the same analysis of less restrictive regulations in *Denver*, and reached the same conclusion with respect to Section 10(b), the government now asks it to defer to the predictive judgments of Congress about the necessity of Section 505. Appellants' Br. 26-28. But the government's argument assumes that Congress has made "a reasonable choice among the available alternatives," Appellants' Br. 27, and only pays lip service to the need for judicial scrutiny "to assure that * * * Congress has drawn reasonable inferences based on substantial evidence." *Turner I*, 512 U.S. at 666. Contrary to the government's plea for judicial leniency, the case for deference is not persuasive where, as here, there is an "absolute void" of legislative fact-finding or deliberation. M.A. App. 15a. In addition, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Sable*, 492 U.S. at 129 (citation omitted).

The rationale for deference is weakened still further where Congress repeatedly has reached an opposite conclusion from the one now urged by the government, and routinely relies on individual user empowerment to protect minors.⁵³ This Court

⁵³ In addition to Section 504, Congress adopted V-chip requirements in the 1996 Act upon the finding that parents will take an active role in supervising their children. Telecomm. Act of 1996 § 551(a)(7), reprinted at 47 U.S.C. § 303 note ("[p]arents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control * * *"). Voluntary measures, according to Congress, such as "[p]roviding parents with timely information about the nature of upcoming video programming," provide a "nonintrusive and narrowly tailored means" of empowering parents. Telecomm. Act of 1996 § 551(a)(9), reprinted at 47 U.S.C. § 303 note; see also 47 U.S.C. § 544(d)(3) (notice requirement permits parents to block free access by non-subscribers to premium cable channels that provide films rated X, NC-17, or R).

has stressed that "we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as *some indication* that more restrictive means are not 'essential' (or will not prove very helpful)." *Denver*, 518 U.S. at 758 (plurality op.) (emphasis in original) (citing *Boos v. Barry*, 485 U.S. at 329). Here, the only congressional actions that fairly can be described as "predictive judgments" about less restrictive means undermine, rather than support, the government's position.

C. The District Court Correctly Held That Section 505 Is Not the Least Restrictive Means of Addressing the Government's Interest

In holding that Section 505 is not the least restrictive means, the district court straightforwardly applied settled law. J.S. App. 32a-39a. Under traditional First Amendment analysis, the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. at 799. The court below found that Section 505 required cable operators "to prevent [signal] bleed in all non-subscribing households, irrespective of whether a household has children," and that "two-thirds of all households in the United States have no children." J.S. App. 33a-34a. By contrast, the district court found that Section 504 is not content-based, *id.* at 35a, and that the existence of a content-neutral alternative "undercut[s] significantly" any defense of a content-based statute. *Id.* (quoting *Boos v. Barry*, 485 U.S. at 329). It concluded that "§ 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights."⁵⁴ The government's arguments that Section 504 is not an adequate alternative, and that

⁵⁴ J.S. App. 38a. To ensure that cable subscribers have adequate notice of their rights under Section 504, the district court directed Playboy to work with cable operators to provide such notice. Playboy has taken no position on the legality of such a command, and did not file a cross-appeal to this aspect of the decision below. In any event, Playboy's extensive arrangements to provide the contemplated notice are described in Playboy's Combined Opposition To Defendants' Post-Trial Motions at 10-11.

it is not less restrictive than Section 505 are unsupported and would require this Court to significantly alter its First Amendment jurisprudence.

1. The government's complaint about Section 504 with added notice requirements as being "hypothetical" or "uncertain" is most curious since courts routinely contemplate potential alternative measures. See *Reno*, 521 U.S. at 855; *Sable*, 492 U.S. at 130. Indeed, in *Denver*, this Court concluded that any perceived problems of voluntary blocking solutions could be cured by less burdensome means, and described a variety of "hypothetical" alternatives, including informational requirements, a simple coding system, or readily available blocking equipment accessible by telephone. 518 U.S. at 759. Here, it is the fact that Congress *could* have enacted an enhanced notice requirement for Section 504 – not that it did so – that undermines Section 505.⁵⁵

Quite obviously, the least restrictive means analysis calls upon courts to anticipate measures Congress might employ to achieve its stated goals, and it does not require that such measures actually be adopted and proven effective. To assume, as does the government here, that a regulatory alternative must have been previously enacted and litigated in order to qualify as a less restrictive means would gut this First Amendment doctrine. Congress would be empowered to censor speech at will merely by refusing to enact less restrictive measures if the law were as the government suggests. And its theory also would reverse the burden of proof, which currently requires the government to demonstrate that its chosen method of regulation is the least restrictive alternative. E.g., *Sable*, 492 U.S. at 129-130. The government cited no cases to support this novel interpretation, nor could it do so, for none exist.

⁵⁵Because a reviewing court may postulate possible alternative regulations, the district court's directive that Playboy provide "effective notice" of Section 504 is not essential to the decision. It is sufficient that Congress might have adopted such a requirement.

The government's argument that inert, indifferent, or distracted parents doom any alternative regulation was specifically considered and rejected by a majority of this Court in *Denver*. There, citing the government's "independent interest" in protecting minors, Appellants asserted, just as they do here, that "innumerable parents," through "absence, distraction, indifference, inertia, or insufficient information" would fail to take advantage of "subscriber-initiated measures to protect children from viewing indecent programming."⁵⁶ Although the *Denver* majority "assume[d] the accuracy of this statement," noted the existence of "inattentive parents," and conceded that "[n]o provision * * * short of an absolute ban can offer certain protection against assault by a determined child," it did not find these factors to be sufficient grounds to justify more restrictive measures. 518 U.S. at 758-759. Instead, it described a number of possible alternative regulations that could be adopted to deal with "the Solicitor General's list of practical difficulties" including – as here – "informational requirements."⁵⁷ The *Denver* finding is highly significant to this case, since the "practical difficulties" of individualized blocking on leased access channels are even greater than for the channels targeted here.⁵⁸

⁵⁶Brief of Fed. Resp'ts at 36-37, *Denver*. The government argued that "[p]arents would have to discover that leased access channels convey indecent programming into their homes even though they never specifically ordered it; they would have to learn about – and focus on – their option to block such programming; and they would have to take the initiative to ensure that such programming is in fact blocked." *Id.*

⁵⁷518 U.S. at 759. This Court also mentioned Section 505 as one potentially less restrictive alternative in *Denver* because it analyzed the Communications Act "as recently amended." 518 U.S. at 756. However, it emphasized that the constitutionality of Section 505 and the other provisions in the 1996 Act was not before it, and it was not deciding "whether the new provisions are themselves lawful." *Id.*

⁵⁸In *Denver*, Justice Thomas pointed to the "distinguishing characteristic of leased access channels," which have no centralized editor and where indecent programming "is especially likely to be shown randomly or intermittently between non-indecent programs." 518 U.S. at 833-834 (internal quotations omitted). However, such concerns about the effectiveness of voluntary blocking

As this Court expressly recognized in *Denver*, the government's argument that programming in *all* homes in a community must be restricted because *some* will not use effective measures to control their own access represents a significant reordering of First Amendment doctrine. Such a striking reinterpretation of the law would not be limited to the context of signal bleed, or even to the cable television medium, but would extend to any setting where a less restrictive regulation depends on user empowerment and individual responsibility. To accept the government's position here would overturn the long-established principle that the state cannot reduce the adult population to only what is fit for a child. *Reno*, 521 U.S. at 875; *Denver*, 518 U.S. at 759; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

2. Contrary to the government's position in this case, Section 504 is not merely a less restrictive alternative, it is also an effective one. This alternative tailors the regulatory solution only to those homes that actually experience signal bleed, or that have not already blocked it using non-regulatory means, and it prevents signal bleed around the clock once deployed. There is no serious question in this case but that individualized blocking pursuant to Section 504 effectively prevents signal bleed when it is used. The district court found that installation of a blocking device under Section 504 effectively "eliminate[s] reception both of undesired channels and of undesired signal bleed." J.S. App. 10a. And the government acknowledges that "parents who had strong feelings about the matter could see to it that their children did not view signal bleed."⁵⁹

do not apply where the objective is to block an entire channel, as is the case with Section 504.

⁵⁹Appellants' Br. 33. The same is true of the V-chip, which depends on parental involvement. The government erroneously states that Playboy conceded that the V-chip will not prevent signal bleed. *Id.* at 35-36 n.25. Although Playboy acknowledged that the V-chip was not *designed* to stop signal bleed, *Mot. to Affirm* at 5 n.4, it nevertheless could be used for that purpose. The government correctly notes that signal bleed obliterates the transmission of

The government's only argument with regard to the effectiveness of Section 504 is its conjecture that "perhaps a large number of parents," Appellants' Br. 33, will be too lax to use the means that the government has made available. The suggestion that the relatively low rate of lockbox distribution shows the ineffectiveness of voluntary measures, *id.* at 37, overlooks the government's failure to prove the pervasiveness of signal bleed. Because Appellants could locate only a handful of anecdotal accounts of signal bleed in the 16 years Playboy Television has been on the air, the court below quite reasonably concluded that "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." J.S. App. 36a. The important point here is not how many lockboxes have been distributed, but that, in the very few cases in which the government was able to document a problem, Section 504 was effective in solving it. J.S. App. 12a ("[i]n each instance, the local MSO offered to, or did in fact, rectify the situation for free (with the exception of 1 individual), with varying degrees of rapidity").

In addition, the government's theory that parents are too unaware or unconcerned to make voluntary measures work cannot be reconciled with the marketplace response to the issue. The consumer electronics industry has developed and marketed cable television converter boxes, televisions and VCRs with built-in child-lock circuitry, and the vast majority of televisions now on the market incorporate such features. The cable television industry provides consumers with technical assistance to address issues such as signal bleed, and its principal trade association adopted a policy to provide blocking of signal bleed on request even before Section 504 was adopted. *See supra* pp. 4-5. Quite apart from the

program ratings, but it overlooks the fact that, under the FCC's technical rules that were adopted after the trial below, V-chips have been designed to enable parents to block unrated programming. *See Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, Implementation of Sections 551(c), (d), and (e) of the Telecomms. Act of 1996*, 13 FCC Rcd. 11248, 11255 (1998); 47 C.F.R. § 15.120(e)(2).

less restrictive regulatory measures such as Section 504, none of the private sector responses would exist if consumers were as apathetic as the government now assumes.

To whatever extent voluntary blocking fails to provide a complete solution to the phenomenon of signal bleed, it is still more effective than time channeling by the government's own reckoning. First, the same factor that prompted the government in this case to describe time channeling as a modest restriction, Appellants' Br. 24 & n.17 — the widespread availability of VCR machines — undermines its assumptions as to the effectiveness of Section 505 to protect children. The FCC in the past rejected the use of a safe harbor as a sufficient alternative to protect children from indecent programming because of VCRs in children's rooms,⁶⁰ and the same logic applies here. Second, unlike Section 504, which completely blocks signal bleed, time channeling ceases at 10 p.m., and the district court pointed out that "a resourceful minor can still watch signal bleed after the safe-harbour hours."⁶¹ Even if Section 504 did not provide an effective solution to signal bleed, Section 505 would be subject to a First Amendment challenge because it provides only limited or incremental support for the interest asserted. *Greater New Orleans Broad. Ass'n. Inc. v. United States*, ___ U.S. ___, 119 S. Ct. 1923, 1932-34 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984); *Bolger*, 463 U.S. at 73.

⁶⁰Implementation of Section 10 of the Cable Consumer Protection & Competition Act of 1992, 8 FCC Rcd. 998, 1009 (1993) (expressly declining to adopt time channeling for leased access programming under the 1992 Cable Act); *Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5306-07 (finding that time channeling is ineffective because of VCRs in children's rooms). As *Amici* noted, "indecent material is plentiful and readily available to adults everywhere." Brief of *Amici* Family Research Council, et al., at 19-20.

⁶¹J.S. App. 37a. For example, in one of the government's few examples, a child reportedly was exposed to unscrambled "pornography" (on an undisclosed channel) at a slumber party late at night, after the parents had gone to bed. Omlin Dep. Tr. 13-14, 18-20.

3. Finally, there is no substance to the government's speculative claim that an "enhanced" Section 504 is more restrictive than Section 505. The district court pointed out that Section 505 is more restrictive in the constitutional sense because it is content-based. J.S. App. 35a. Moreover, this Court in *Denver* noted that a provision that allows cable operators to drop indecent programming or even a rule that "create[s] a risk that a program will not appear" is "significantly less restrictive" than a mandatory restriction such as time channeling. 518 U.S. at 746-747 (plurality op.).

In any event, there is no support for the government's assertion that an "enhanced" Section 504 would render carriage of adult channels "uneconomical." Appellants' Br. 35-40. This argument is premised on a number of factual assumptions, none of which is borne out in the record. Even if this Court were to assume that existing notice to subscribers has been inadequate,⁶² the government never demonstrated that signal bleed is such a pervasive problem that increased awareness would lead to a huge increase in demand for blocking devices or that the cost of blocking devices under Section 504 would be prohibitive.⁶³

Whether or not notice was "adequate" in the past, adopting measures to increase public awareness of Section 504 would not

⁶²Although for purposes of its current argument the government asserts that subscribers had not previously been informed about the availability of blocking devices, it stressed to the district court the comprehensive efforts undertaken by the NCTA, the major cable operators, and adult programmers to inform subscribers of the availability of blocking devices. Defs. Post-Trial Br. 40-42; Defs. Exs. 139, 140; Pl. Exs. 35, 147, 194, 196; see J.S. App. 20a. The district court never found that current efforts were inadequate, but only questioned their sufficiency due to the response rate. However, the absence of a finding on this point merely indicates that the government failed to meet its burden of proof. *Sable*, 492 U.S. at 129-131.

⁶³The government asserts incorrectly that an enhanced Section 504 was not discussed below or that the district court never analyzed that point. Appellants' Br. 40. On the contrary, the issue was addressed specifically at oral argument by both Playboy and the government. Closing Argument Tr. 47-51, 104-110, 129-130.

lead to a significant increase in demand for blocking devices to the extent signal bleed is not a serious problem or if non-regulatory alternatives are sufficient to address it. As noted above, the district court found that "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem," and that the government "has not convinced us that it is a pervasive problem." J.S. App. 36a. Accordingly, it is far from "inescapabl[e]," as the government now asserts, Appellants' Br. 37, that an enhanced Section 504 would lead to a huge increase in demand for blocking devices.

Even if there were a significant increase in demand for blocking devices, however, the government never demonstrated that Section 504 would lead to greater restrictions on adult channels. It strains credulity to assume that enhanced notice requirements would increase the number of complaints from the "handful of isolated incidents" in the record below, J.S. App. 11a-12a, to the millions that would be required to make adult channels uneconomical.⁶⁴ In addition, the government and the court below vastly overstated the cost of compliance. Where traps are placed on a subscriber's line to prevent unwanted signal bleed (as opposed to preventing theft of a premium service), a blocking device may be easily installed by a customer in the home without the need for a service call.⁶⁵

The government's expert agreed that profit-maximizing cable operators would use the most economical means of compliance, Trial Tr. 705-707, and eliminating the cost of a service call alone

⁶⁴Six percent of the 62 million cable television households in the United States – the number used in the government's "break-even" analysis – is equal to 3.72 million households.

⁶⁵The government's expert demonstrated the ease with which positive traps can be installed by customers, and testified that such traps could be mailed to customers at minimal expense. Prelim. Inj. Tr. at 371-372. The government's expert also agreed that negative traps could be installed in the same manner by subscribers. Jackson Dep. Tr. 24-26.

reduces the cost of compliance with Section 504 by more than 80 percent. This single adjustment would change the government's "break-even" point from 6 percent to 24 percent, or approximately 15 million cable households. Not only did the government vastly overestimate compliance costs, but its break-even analysis also underestimated cable operators' revenues. Once this deeply flawed analysis is corrected with accurate buy rates for adult programming and adjusted to account for the life of the hardware, the true "break-even" point is 80 percent. See Pl. Post-Trial Reply Br. at 44-48; Closing Arguments Tr. at 51. Thus, even if the majority of cable subscribers asserted their rights under Section 504, it would not be remotely as restrictive as Section 505.

It is important to note, finally, that the government's economic argument is based on a false dichotomy. The issue is not whether Section 504 may be more restrictive than Section 505; it is whether Section 504, standing alone, is more restrictive than Sections 504 and 505 together. See Appellants' Br. 39 (even with safe harbor restrictions, subscribers will seek blocking devices under Section 504); Br. of *Amici* Family Research Council, et al., at 25 (Section 504 blocking is intended to be used in addition to Section 505 restrictions). As adopted by Congress, the Telecommunications Act includes both Section 504 and Section 505. It is illogical to suggest that Section 504, standing alone, is more restrictive than existing law.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE GOVERNMENT'S POST-TRIAL MOTIONS

The district court properly dismissed the government's post-trial motions for lack of jurisdiction. J.S. App. 91a. Appellants' Rule 59(e) motion to alter or amend the judgment by limiting relief solely to Playboy, as well as its Rule 60(a) motion seeking to add the district court's "effective notice" language to the Order, violated the well-settled rule that "[t]he filing of a notice of appeal is an event of jurisdictional significance," and that a federal district court and a reviewing court "should not attempt to assert jurisdiction over a case simultaneously." *Griggs v. Provident*

Consumer Discount Co., 459 U.S. 56, 58 (1982). By noticing its appeal, the government deprived the district court of jurisdiction to consider its post-trial motions. *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389, 390 n.2 (1982). As the leading Supreme Court procedure treatise makes clear "[a]n attempt by the district court to change the judgment after a notice of appeal from its ruling has been filed is ineffective." Stern & Gressman at 392.

The government's brief makes clear that its actual complaint is with this Court's rules, and not with the decision below. The controversy arises from a perceived ambiguity in Rule 18.1 that assertedly forced it to file its notice of appeal while the post-trial motions were pending in the district court or risk forfeiting its right to appeal. Appellants' Br. 42. However, it has been this Court's consistent practice since *Department of Banking v. Pink*, 317 U.S. 264 (1942) (*per curiam*) to toll the time for filing petitions for certiorari until after petitions for rehearing are denied. See *Missouri v. Jenkins*, 495 U.S. 33, 45-50 (1990). This also has been the practice for motions to reconsider judgments of federal district courts that are directly appealable to this Court. *Communist Party v. Whitcomb*, 414 U.S. 441, 444-446 (1974); see also Stern & Gressman, at 284-285. This Court generally avoids interpretations of procedural rules that would have the effect of cutting off the government's right to appeal. E.g., *Jenkins*, 495 U.S. at 50; *Forman v. United States*, 361 U.S. 416, 426 (1960). Accordingly, the government's claim that it was compelled to file its notice of appeal in order to preserve its rights is not credible, and its professed concern over the wording of Rule 18.1 would be more sensibly resolved by appeal to this Court's ability to clarify its own rules.

Having decided to file its notice of appeal from the district court's ruling, however, the government cannot avoid the jurisdictional implications of its act. Appellants' post-trial motions sought to alter the substantive nature of the decision below, and not to correct "clerical mistakes" as the government characterizes them. As this Court established in *League of Women*

Voters, it may be appropriate to exercise simultaneous appellate jurisdiction while the lower court resolves a post-trial motion only where the post-trial motion is entirely collateral and "uniquely separable from the cause of action." 468 U.S. at 373-374 n.10 (citation omitted). There, the post-trial motion had no effect on "the prompt determination by the court of last resort of disputed questions of constitutionality of acts of the Congress." *Id.* (citation omitted). Here, however, the Telecommunications Act established an expedited appeal procedure for the very purpose of permitting this Court to rule on disputed questions of constitutionality. Telecomms. Act of 1996 § 561(b), reprinted at 47 U.S.C. § 223 note (Supp. III 1998). In this context, Appellants' Rule 59(e) motion to limit relief only to Playboy would have essentially nullified Playboy's facial challenge to Section 505. This Court rejected the government's identical modification request in *Reno v. ACLU*, concluding that "[w]e have no authority * * * to convert this litigation into an 'as-applied' challenge," 521 U.S. at 883, and it should do the same thing here. Thus, even if the district court had jurisdiction to consider the government's post-trial motions, it would have been compelled to reject them pursuant to *Reno*.⁶⁶

The government's claim that the district court could have asserted jurisdiction over its post-trial motions because a direct appeal to this Court "functions similarly" to an appeal under Rule 4, Fed. R. App. P., as it existed before 1979, Appellants' Br. 43-44, is similarly unavailing. It simply is incorrect to suggest, as does the government here, that there is "no chance" that the district court would be acting on a post-trial motion at the same time as this Court because the appellant is allowed 60 days to file a jurisdictional statement. *Id.* at 44. Unlike the situation under the former Rule 4, the process for initiating appellate jurisdiction is

⁶⁶Appellants' Rule 60(a) motion also would have materially altered the district court's judgment by including in the Order the instruction that Playboy ensure cable systems carrying its programming provide notice of Section 504 to their subscribers. As noted above, the proposed modification would have affected Playboy's substantive rights.

not entirely within the lower court's control. Under Rule 18.1 the appellant may file its jurisdictional statement before the 60-day deadline, or the district court could be delayed in issuing a decision that resolves the post-trial motion. In addition, it would vastly complicate an appellant's ability to prepare a jurisdictional statement that adequately identifies the substantial federal questions at issue if the judgment may be altered in the interim by the district court. The government's theory would cause great confusion over this Court's appellate jurisdiction, and it should be rejected.

CONCLUSION

For the foregoing reasons, Playboy respectfully urges this Court to affirm the decision below.

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**Addendum to Brief of Appellee
United States v. Playboy
No. 98-1682**

***Appellee Playboy Entertainment Group, Inc.'s Exhibits
Referenced in Brief of Appellee***

Pl. Ex. 1	Declaration of Anthony J. Lynn, President, Playboy Entertainment Group, Inc., May 1996
Pl. Ex. 4	Declaration of Leland Wayne Hall
Pl. Ex. 5	Playboy Films and Programs Licensed to HBO
Pl. Ex. 6	Programming Licensed to Playboy TV and other PPV/Premium Networks (By Distributor)
Pl. Ex. 18	Programming Shown On And Taped From Non-Adult Cable Networks
Pl. Ex. 27	Defendants' Responses to Plaintiff Playboy Entertainment Group, Inc.'s Requests for Admissions and Interrogatories, General Objections and Request for Admission No. 1
Pl. Ex. 35	National Cable Television Association (NCTA) Resolution on Sexually- Oriented Programming Services, February 2, 1995
Pl. Ex. 43	Package of consumer complaint letters directed to the FCC and Members of Congress; replies to same
Pl. Ex. 60	Declaration of John Mansell, 1996

Pl. Ex. 62	Declaration of John Mansell, January 20, 1998.
Pl. Ex. 62(b)	b. TV and Digital TV Household Universe: 1979-2007
Pl. Ex. 117	Comments of Playboy Entertainment Group, Inc., filed April 26, 1996 with the FCC in: <i>In re Implementation of Section 505 of the Telecommunications Act of 1996</i> , CS Dkt. No. 96-40.
Pl. Ex. 118	Request for Expedited Declaratory Ruling filed with the FCC by Playboy Entertainment Group, Inc. to Clarify Compliance Obligation Under Section 505 of the Telecommunications Act of 1996 with Exhibits, filed November 19, 1997
Pl. Ex. 119	Defendants' Responses to Plaintiff Playboy Entertainment Group, Inc.'s First Interrogatories, Nos. 1, 2, 4, 5, 6, 7, 8, 10, 11, 12, 13
Pl. Ex. 132	Playboy's Editorial Guidelines
Pl. Ex. 147	Letter from Barry Marshall of TCI to Dwight P. Clark explaining TCI's policy regarding carriage of adult oriented programming services
Pl. Ex. 149	Memo from Barry Marshall to Divisions / Region Vice Presidents et al., re: TCI Adoption of NCTA Adult Programming Commitments, July 31, 1995

Pl. Ex. 194	Jones Intercable flyer offering parental control and blocking devices for cable television
Pl. Ex. 196	TCI mailer offering parental control and blocking devices
Pl. Ex. 219	Consumer Research Data Base Tracking of Pay Per View Purchase Behavior, TWC Research Brief, November 2, 1994 (Sealed but for these statistics)
Pl. Ex. 210	Letter from Pamela R. Thorne, Vice President, Government and Community Relations, Time Warner (Houston, TX) to Mayor and City Council of Hunters Creek Village, TX re: options for blocking adult programming
Pl. Ex. 225	Letter from Marc Jaffe, Cable Television Program Manager, City of San Diego, CA, to Elizabeth Beaty, Chief, Financial Analysis and Compliance Division, FCC, June 24, 1997
Pl. Ex. 245	Letter from Patrick Trueman, U.S. Department of Justice, to Renee Licht, Federal Communications Commission, July 13, 1992

Appellants' Exhibits Referenced in Brief of Appellee

Defs. Ex. 1	Videotape, Poway, CA, 1994
Defs. Ex. 3	Videotape, Spice, Channel 95, Arlington, VA, March 28, 1996
Defs. Ex. 4	Videotape, Channels 44 and 45,

Orange, CA, November 27, 1994

Defs. Ex. 36	360 – Sex in The USA (Playboy video)
Defs. Ex. 37	Hot, Sexy and Safer with Suzi Landolphi (Playboy video)
Defs. Ex. 38	Doin' It Right (Playboy video)
Defs. Ex. 39	1997 Video Playmate Calendar (Playboy video)
Defs. Ex. 40	Playboy Late Night, #97-10 (Playboy video)
Defs. Ex. 41	World of Playboy, #97-11 (Playboy video)
Defs. Ex. 42	9 ½ Weeks
Defs. Ex. 43	The Unbearable Lightness of Being
Defs. Ex. 83(d)	Rebuttal Statement of Jackson and Kramer, January 20, 1998
	d. Connection Cable Systems to subscribers' TVs and VCRs – Guidelines for the Cable Television Industry
Defs. Ex. 139	Parental control advisory material from various cable operators
Defs. Ex. 140	Preliminary Injunction Declaration of John Roth Woods

Trial (March 4-6, 1998) Testimony Referenced in Brief of Appellee

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371-372	Testimony of Jonathan Kramer, expert witness for Defendants

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No. 98-1682

CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

PLAYBOY ENTERTAINMENT GROUP, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

In our opening brief, we explain that, although the district court's holding cannot be sustained under *any* standard of review, appropriate review under the First Amendment in this case should take into account this Court's precedents requiring special care before striking down an Act of Congress designed to protect children from sexually explicit material on television and radio and to protect the privacy of the home from the intrusion of sexually explicit programming. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748-749 (1978). This Court has repeatedly—and recently—referred to the pervasiveness of those media, their intrusiveness into the home, and their accessibility to children as the factors that justify regulation of indecency on television or radio. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 127 (1989); *Reno v. American Civil Liberties Union (ACLU)*, 521 U.S. 844, 866-868 (1997); see also *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-745, 748 (1996) (plurality opinion); *id.* at 776 (Souter, J., concurring) (“the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television”).

Indeed, as we explain in our opening brief (at 22-26), there are additional factors present here that make it particularly important that Congress have the flexibility necessary to regulate graphic depictions of sexual activity on television, and that reinforce the constitutionality of Section 505. Those factors include that (a) Section 505 is aimed not at the intended communication between appellee and its subscribers, but at a byproduct of that communication (signal bleed) that is harmful to children (see Gov't Br. 22)¹; (b) the burden on

¹ Appellee asserts (Br. 19-20) that this Court “has rejected similar efforts to mischaracterize direct restrictions on speech as regulations of ‘secondary effects.’” But what this Court has held is that “[r]egulations

speech that results from Section 505 is at present modest and is decreasing over time as the advance to digital technology makes elimination of signal bleed easy and cost-free (see Gov't Br. 23-25); (c) the risks to children—even very young children—posed by signal bleed of appellee's consistent and very graphic sexually explicit programming are substantially greater than in *Pacifica* (see Gov't Br. 25-26; see also pp. 5-6, *infra*); and (d) Section 505 leaves open ample means (such as time-channeling and the use of VCRs by viewers, or digital transmission for those operators so equipped) for transmission of appellee's speech and therefore at worst addresses when—not whether—appellee's programming will be shown (see Gov't Br. 22-25; see also *Reno v. ACLU*, 521 U.S. at 867 (noting that the “order in *Pacifica* designate[d] when—rather than whether—it would be permissible to air such a program in that particular medium”). In light of the extraordinarily high costs of unduly limiting society's ability to protect children in this context, Congress's reasonable predictive judgments about the need for Section 505 and the inefficacy of alternative modes of protection should be accorded “substantial deference.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality opinion); see Gov't Br. 26-28. Section 505 therefore should be sustained by this Court.

that focus on the direct impact of speech on its audience * * * are not the type of ‘secondary effects’” that subject the restrictions to more relaxed scrutiny. *Boos v. Barry*, 485 U.S. 312, 321 (1988); see also *Reno v. ACLU*, 521 U.S. at 868. Section 505 does not “focus on the direct impact of speech on its audience,” because it is not directed at the only communication for which appellee has ever claimed First Amendment protection—that between appellee and its subscribers. Instead, it is directed at a byproduct of that speech—the impact of signal bleed in homes that do not subscribe to appellee's services, do not want appellee's programming, and have no legal interest in obtaining it.

A. The Appropriate Standard Of Review Does Not Turn On Whether Television Programming Is Transmitted Through A Wire Or Over The Airwaves

Appellee argues that a different standard of review, less protective of children, applies to cable television than the one this Court has held applicable to broadcast television and radio. Appellee's arguments are illogical and inconsistent with this Court's precedents.

1. Appellee places its primary reliance on the assertion (Br. 16, 30-31, 35, 43, 45) that there are technical differences between cable television and broadcast television that make it appropriate to apply different standards of review to regulations of sexually explicit material on the two media. To all ordinary appearances, of course, the two means of transmitting television programming are indistinguishable; a child tuning in signal bleed on a television set would not likely know or care whether the programming had reached the home via a wire or via the air waves. See *Denver Area*, 518 U.S. at 744-745 (plurality opinion). Appellee argues, however, that there are technical means available to protect children against signal bleed from sexually explicit programming on cable television that would not be effective on broadcast television, and that the standard of review applicable to restrictions of sexually explicit material should therefore vary with the means (cable or airwaves) by which the signal is transmitted.

Appellee presented evidence in support of its contentions regarding alternative technical means of control to the district court. But the government introduced contrary evidence demonstrating that the alternative methods proposed by appellee are ineffective, difficult for parents to operate, and easy for children to circumvent. See Gov't Post-Trial Reply 15-18. The district court did not expressly resolve the resulting factual disputes, but the court's reliance on an enhanced Section 504 as a less restrictive alternative—rather than on those other technological alternatives—suggests

that the court found the government's evidence highly probative. In any event, this Court should not resolve such factual disputes in the first instance.²

² An example of the problem presented by appellee's effort to have this Court resolve disputed factual issues is appellee's attempt (Br. 42 n.59) to rely on the V-chip as an alternative to Section 505, notwithstanding its concession in its motion to affirm (at 4-5) that the V-chip mechanism was not designed to address signal bleed. Appellee now relies on new V-chip regulations promulgated by the FCC after trial. See *In re Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, Implementation of Sections 551(c), (d), and (e) of the Telecomm. Act of 1996*, 13 F.C.C.R. 11,248, para. 11 (1998) (*Implementation of Section 551*); 47 C.F.R. 15.120(e)(2). Appellee's theory is that V-chips will now be able to block unrated programming, and in doing so they will therefore block signal bleed from appellee's programming.

There are several problems with appellee's contention. First, the FCC did not discuss or mention signal bleed in its order, and it has never found that V-chips equipped with the ability to block unrated programming will in fact interpret signal bleed as unrated programming. Thus, it is not clear that the capacity to block unrated programs would do anything to block signal bleed. Second, the FCC regulations do not *require* V-chips to have the capability to block unrated programming; the FCC merely stated that "it is *permissible* to include features [in the V-chip] that allow the user to reprogram the receiver to block programs that are not rated." 47 C.F.R. 15.120(e)(2) (emphasis added). Third, the regulations provide that "[t]he default state of a [television] receiver (i.e., as provided to the consumer) should *not* block unrated programs." *Ibid.* (emphasis added). Thus, a parent who wants to block unrated programming must not only learn about the problem of signal bleed and the (hypothetical) ability of the V-chip to block it, but the parent must also learn how to "reprogram" the television to engage this feature. *Ibid.* Fourth, the FCC noted that the television rating system "will apply to all television programming *except for news, sports, and [movies that incorporate the customary movie rating system].*" *Implementation of Section 551*, para. 11 (emphasis added). Thus, a parent who purchases a television set that has the ability to block unrated programming and surmounts all of the other obstacles above will find out that enabling the ability of the V-chip to block unrated program will likely block all news and sports programming as well. Finally, because V-chips are only now being required to be included on new television sets with screen sizes larger than 13 inches, see 47 C.F.R. 15.120(b), and because existing television sets without V-chips will likely be in use for many

2. Appellee also appears to argue that Congress has less authority to protect minors from sexually explicit material on cable television than on broadcast television, because some cable channels (such as the ones carrying appellee's programming) broadcast an enormous amount of such material. According to appellee, whereas *Pacifica* "involved programming that represented 'a dramatic departure from traditional program content,'" sexually explicit content "has always been available on this medium." Br. 23. Appellee does not dispute the district court's findings that appellee has chosen "to broadcast only indecent material" (Br. 25), but it justifies that choice on the ground that "cable television networks generally are offered as niche services defined by subject matter" (Br. 26).

Appellee is correct that sexually explicit programming content is available on cable television. The district court made specific findings about the matter, noting that appellee's channels carry "virtually 100% sexually explicit adult programming." J.S. App. 6a, 42a, 47a.³ Indeed, it is the availability of such material to nonsubscribers through signal bleed that Congress was attempting to stem in enacting Section 505. But appellee is incorrect to assume, counter-intuitively, that the more sexually explicit content a programmer chooses to provide, the less capability Congress has to protect minors from that content. To the contrary, as we pointed out in our opening brief (Gov't Br. 25-26), the "unbroken continuum of sexually explicit sounds and images, delivered without invitation to [children's] home[s]" on appellee's channels, J.S. App. 73a n.26, establishes that the

years to come, the V-chip system could provide at best only a very long-term and partial solution to the problem of signal bleed.

³ Appellee's complaints (*e.g.*, Br. 25, 29) that Section 505 would eliminate its broadcasting during two-thirds of the broadcast day on cable systems that are not digitally equipped also demonstrates the extent to which appellee is committed to broadcasting solely sexually explicit adult programming.

threat to minors is more serious in this case than in *Pacifica*, which involved a single broadcast of a satirical monologue. See also Gov't Br. 5-7 & nn. 2-4 (describing content of appellee's programming).

B. Vagueness Principles Furnish No Basis For Invalidating Section 505 Or Applying A More Stringent Standard Of Review

1. As it did before the district court, appellee argues extensively (Br. 26-30) that more stringent review should be applied to Section 505, because it is unconstitutionally vague and because, in any event, its asserted vagueness "precludes any attempt by [appellee] to minimize the censorial effect of time channeling." Br. 26. In response, the government argued in the district court that appellee's claim should be rejected because Section 505's application to the material that appellee in fact seeks to transmit on its networks is quite clear. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 58-59 (1976). The three-judge district court noted those contentions in an October 31, 1997, order, but it concluded at that time that certain "material questions of fact remain unresolved" that might have a bearing on the disposition of appellee's vagueness challenge. Mot. to Aff. App. 24a. The court noted, for example, that appellee's standing to challenge Section 505 on vagueness grounds would, in its view, require further information, including "Playboy's intentions, if any, to broadcast, outside the safe harbor hours, programming that is not sexually-oriented or that is materially different in sexual-explicitness to its current format." *Id.* at 24a-25a. The court accordingly denied appellee's motion for partial summary judgment on vagueness, without prejudice to later renewal of the motion. *Id.* at 26a-27a. Although appellee renewed its vagueness claim after the trial in this case, the district court did not address that claim. This Court ought not resolve appellee's vagueness claim in the first instance, at least to the extent that resolution of that claim would turn on contested factual issues.

2. In any event, appellee's vagueness claim is wrong on its merits. The statute at issue in *Denver Area* relied on a formulation that, for practical purposes, is identical to the formulation in Section 505.⁴ The plurality in *Denver Area* expressly held that the formulation was not "too vague," 518 U.S. at 750, and no Justice in *Denver Area* expressed any disagreement with that conclusion. Indeed, because Justice Thomas, joined by the Chief Justice and Justice Scalia, would have upheld the constitutionality of the entire statute in *Denver Area*, see *id.* at 812, they necessarily agreed with the plurality that it was not unconstitutionally vague. Like the provisions at issue in *Denver Area*, Section 505 is therefore "not impermissibly vague." *Id.* at 753.⁵ See also *Dial Info*.

⁴ Compare *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C.R. 5386, paras. 6, 9 (1996) (defining "indecent," as used in Section 505, as "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable * * * medium") with *Denver Area*, 518 U.S. at 736 (defining "sexually explicit" material, as used in the statute in that case, as "descriptions or depictions of 'sexual or excretory activities or organs in a patently offensive manner' as measured by the cable viewing community").

⁵ Appellee argues (Br. 28-29) that a number of its actual or proposed programs are not indecent. To the extent the precise nature of individual programs is relevant to this Court's consideration of the case, we urge the Court to review the programs at issue and the discussion of them in our Post-Trial Brief (at 67-68). One program, for example, DX 36, includes a profile of a pornography star, with scenes of lesbian, oral, and group sex and a segment on a dial-a-porn company, including four of the seven "filthy words" at issue in *Pacifica*. Another, DX 40, includes the same dial-a-porn segment, along with scenes of sexual intercourse. Another submission, "Video Playmate Calendar," DX 39, is a series of twelve videos in which naked female models strut and move provocatively, or squirm on silken-sheeted beds, while caressing their breasts and genitals in implied self-arousal. And another program that purports to promote "safe sex" includes scenes in which a woman uses a zucchini to demonstrate how to put a condom on a man's penis with her tongue and in which, after a woman puts a condom on a man's erect penis, the couple engage in a series of sex acts.

Servs. Corp. v. Thornburgh, 938 F.2d 1535, 1540-1541 (2d Cir. 1991) (rejecting vagueness challenge to identical definition of "indecent," as used in dial-a-porn statute), cert. denied, 502 U.S. 1072 (1992); *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 874-876 (9th Cir. 1991) (same); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-1339 (D.C. Cir. 1988) (broadcast regulation).

3. Without citing the discussion in *Denver Area*, appellee points out (Br. 26) that the Court in *Reno v. ACLU* found that the internet indecency statute in that case, which also used "indecency" formulations, had "ambiguities concerning the scope of its coverage that render it problematic for purposes of the First Amendment." 521 U.S. at 870. Even in that context, the Court in *Reno* did not hold that the term "indecency" was vague, see *id.* at 870, but rather decided the case on overbreadth grounds, see *id.* at 874. In any event, the Court in *Reno* did not overrule the holding that the "indecency" formulation in *Denver Area* was not unconstitutionally vague, but instead specifically explained why that holding was inapplicable in *Reno*. See *id.* at 872. Because the formulation of the vagueness standard under Section 505 and the context in which it is used are identical in relevant

With respect to another of its programs, appellee errs in stating (Br. 28 n.36) that "the First Circuit [in *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 532 (1995), cert. denied, 516 U.S. 1159 (1996),] held that Playboy's program *Hot, Sexy and Safer* was appropriate for a mandatory middle school assembly." The First Circuit certainly did not hold that the program was "appropriate" for the ninth and tenth grade high school, see 68 F.3d at 541—not, as appellee states, "middle school"—students to whom it was shown. Instead, the First Circuit reached the quite different conclusion that plaintiffs had failed to demonstrate that the school officials had violated the Constitution or committed sexual harassment by showing the program to ninth and tenth graders. Of course, even if the First Circuit had believed that the program was "appropriate" for high school students, that would not establish that it is "appropriate" for the much younger children who have access to television sets and who could listen to it and view its signal bleed on appellee's networks.

respects to the statute at issue in *Denver Area*, the vagueness ruling in *Denver Area* is controlling here.

First, the ambiguities in the internet indecency statute in *Reno* arose in part because that statute contained two different and competing formulations of the statutory standard. See 521 U.S. at 870-871. Section 505, by contrast, uses a single formulation, which, as we note in our opening brief (at 8), has been carefully defined by the FCC. Indeed, the FCC's availability to define the statutory terms where necessary and definitively work out their meanings in future cases is itself a factor distinguishing this case from *Reno*. See *Dial Info. Servs.*, 938 F.2d at 1540-1541.

Second, in another passage not discussed by appellee, the Court in *Reno* explained that the internet indecency statute was a criminal statute, and therefore any potential vagueness "pose[d] greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area*." 521 U.S. at 872. Like the statute in *Denver Area* (and *Pacifica*)—and unlike the statute in *Reno*—Section 505 is a "civil regulation."

Finally, it is significant in this regard that Section 505 and the statutes at issue in *Denver Area* (and *Pacifica*) are directed at sophisticated commercial entities (like appellee) in the cable broadcasting and transmission businesses, whereas the internet indecency statute in *Reno* was "not limited to commercial speech or commercial entities," but "embrace[d] all nonprofit entities and individuals posting indecent messages or displaying them on their own computers," 521 U.S. at 877. Cf. *Mot. to Aff. App. 24a* (district court below, in discussing vagueness, notes that "because television broadcasting is a highly public forum, there is no risk that Section 505 would impose undue restrictions upon purely private

speech"). The vagueness holding in *Denver Area* is therefore controlling here.⁶

C. The District Court Erred In Holding That Its Enhanced Version Of Section 504 Is A Less Restrictive Alternative To Section 505

The district court held Section 505 unconstitutional on the ground that the enhanced version of Section 504 the court posited, if enacted by Congress, would be a less restrictive alternative to Section 505. J.S. App. 34a-39a. We argue in our opening brief that the district court's analysis and conclusion are defective, regardless of the standard of review to be applied. The alternative that the district court conceived—providing for notice to cable subscribers of the existence of signal bleed of sexually explicit programming and of a feasible means to eliminate it—would not be an adequate alternative to Section 505 because it would not serve all of the compelling interests served by Section 505 (see Gov't Br. 30-35), and it would not be less restrictive because it would lead to (at least) the same burdens on appellee's speech (see Gov't Br. 35-40).

We do not contend, as appellee suggests (Br. 40), "that a regulatory alternative must have been previously enacted and litigated in order to qualify as a less restrictive means." We do contend, however, that a court has an obligation to exercise considerable care before holding any Act of Congress unconstitutional, and the need for such care is especially important in a case like this. What is at stake here is society's interest in protecting children and in the sanctity and privacy of the home. An error in holding that a hypothetical and untried scheme is a less restrictive alternative can result

⁶ Appellee is correct (Br. 14 n.13) that a "willful" violation of the Communications Act is potentially punishable with a criminal penalty under 47 U.S.C. 501. But that did not convert the entire Communications Act into a criminal statute in *Denver Area* or *Pacifica*, and it does not do so here. Appellee is unable to point to a single criminal prosecution under that provision for violation of an indecency standard, and we are aware of none.

in leaving children unprotected from materials our society has found to be inappropriate for them and leaving individuals unable to protect the privacy of their homes from the intrusion of such materials. Especially when a proposed alternative (like the district court's enhanced Section 504) has never been used in fact and has never been subjected to the crucible of litigation, a court should exercise special caution before concluding that the ability to conceive of the alternative is sufficient to render an Act of Congress unconstitutional.

The district court exercised no such caution. It decided that the enhanced Section 504 would be a less restrictive alternative without affording the parties an opportunity to address the inadequacies of its suggested scheme and the speech-restrictive effects that scheme would have on appellee's programming. See Gov't Br. 28-29.⁷ As a result, the court adopted, as a less restrictive alternative, an ill-defined enhanced Section 504 scheme that its own findings demonstrate would be inefficacious and speech-restrictive to at least the same degree as Section 505.

⁷ Appellee argues (Br. 45) that the question of the efficacy of an enhanced Section 504 was addressed during closing arguments. What was addressed by appellee's counsel (at closing argument, when it was too late to put on additional evidence) was the extent to which cable operators *currently* provide notice of the availability of blocking. See Closing Argument Tr. 47-51. Aside from that, there were only three stray, and similarly vague, references by appellee's counsel to notice. See *id.* at 48-49 ("it certainly would be within the realm of possibility to require more frequent notice or perhaps even more prominent notice of the ability to use those lockout features"); *id.* at 49 (similar), 130 (similar). We are unable to find any reference to enhanced notice requirements in government counsel's remarks at Closing Argument Tr. 104-110, which is also cited by appellee. In any event, the entire scheme conceived by the district court for enhanced notice and easy availability of blocking devices was not advocated by either party at trial, and it was not mentioned by the court at trial.

1. The Enhanced Section 504 Scheme Would Not Be An Efficacious Alternative To Section 505

As we explain in our opening brief (at 30-35), the district court's enhanced Section 504 would not be an efficacious alternative to Section 505 because it would not serve one of the key interests underlying Section 505—society's interest in seeing to it that children are not exposed to sexually explicit materials. That interest would of course be served in instances (which by appellee's account will be rare, see Br. 46 & n.64) in which parents request blocking under an enhanced Section 504. But in cases in which parents fail to make use of an enhanced Section 504 procedure out of distraction, inertia, or indifference, Section 505 would be the only means to protect society's independent interest.⁸ Appellee's contention (Br. 43) that notice under an enhanced Section 504 would be so effective (despite the cable operator's built-in financial incentive to minimize notice and thereby minimize the costs of providing blocking) that such cases of parental distraction, inertia, or indifference will be rare is extraordinarily unlikely, and it runs directly contrary to common-sense—and scientifically based studies (see Gov't Br. 33 n.23)—about human behavior. Indeed, if appellee's prediction elsewhere (Br. 46) that very few households would request blocking under an enhanced Section 504 is correct, the only plausible explanation would be that most parents had failed to do so out of distraction, inertia, or indifference. The only other alternative—that most parents,

⁸ Appellee curiously criticizes Section 505 (Br. 44) as being ineffective because it permits transmission of sexually explicit programming during the safe-harbor hours. Since *Pacifica*, this Court has accepted that time-channeling to the late-night hours is an effective (albeit not perfectly effective) means to protect children from sexually explicit material on television and radio. Congress's decision to permit the safe harbor, moreover, demonstrates that Congress was not attempting to censor or suppress appellee's speech, but merely to protect children from its harmful effects. Appellee would surely not have been more satisfied with Section 505 had it contained no safe-harbor provision.

genuinely informed that their children could be exposed to sexually explicit programming via signal bleed, would prefer such exposure be available—is not plausible.

Appellee does not directly deny that there is a compelling societal interest in the upbringing and protection of children that is independent of the actions of particular parents. Appellee does assert (Br. 41), however, that this Court implicitly rejected the validity or substantiality of such an interest in *Denver Area* when it held Section 10(b) of the Cable Television Act of 1992 unconstitutional. Appellee's view is impossible to square with the consistent declarations of this Court—and of each Justice in the *Denver Area* case—that society does have such an interest and that it is compelling. See Gov't Br. 31 & n.22 (giving citations). In addition, as we note below (see p. 16, *infra*), one reason why the Court reached the conclusion it did in *Denver Area* was that it posited that one of the alternatives that would remain after Section 10(b) was struck down was Section 505. See 518 U.S. at 756. The Court's rejection of Section 10(b) was thus based in part on the assumption that Section 505 would continue to be available to protect society's independent interest in protecting children. *Denver Area* in no way suggests that that interest—and Congress's ability to legislate in support of that interest—could be disregarded.

2. The Enhanced Section 504 Would Not Be Less Restrictive Of Speech Than Section 505

We also explain in our opening brief (at 35-40) that the district court's enhanced Section 504 would not be less restrictive than Section 505, because, based on the district court's own findings, it would lead to the same (or more severe) limitations on the availability of appellee's programming. We need not repeat that explanation here, because appellee responds to it only by attacking the facts as found by the district court, contending that "the government and the court below vastly overstated the cost of compliance" with an enhanced Section 504. Appellee Br. 46 (emphasis

added). Appellee has entirely failed—indeed, has barely attempted—to carry its heavy burden of showing that the district court's factual determinations were clearly erroneous. This Court therefore should not further consider appellee's contentions on this point.⁹

Appellee also refers (Br. 39) to the district court's conclusion that Section 504 is not content-based, see J.S. App. 35a, and argues that Section 504 is therefore a less restrictive alternative to Section 505. Of course, the district court repeatedly explained that Section 504, without a requirement of enhanced notice and easy availability of blocking, would not be effective at all to solve the problem of signal bleed. See J.S. App. 20a ("If * * * § 504 is to be an effective alternative to § 505, adequate notice of the availability of the no-cost blocking devices is critical."); accord *id.* at 19a, 38a. Once the requirements of enhanced notice of signal bleed and easy availability of blocking are added to Section 504, however, it is no longer content-neutral, for those requirements

⁹ The district court found that cable operators would cease to earn a profit by carrying appellee's networks if 3%-6% of subscribers requested individual blocking of those networks. J.S. App. 22a. The district court also noted that cable operators would cease carrying appellee's networks long before they reached that no-profit point, since they would do so "if costs rose to such a point that the profit from adult channels was less than the profit from channels unlikely to require blocking." *Ibid.* See Gov't Br. 36-37. Thus, even appellee's initial calculation, based on the 6% figure (Br. 46 & n.64), far overstates the number of households whose requests for blocking under an enhanced Section 504 would be necessary to cause cable operators to time-channel (or cease carrying) appellee's programming. With respect to appellee's further contentions that the costs of providing blocking are very low, the district court rejected as "unavailing" and contrary to the expert testimony the very contentions advanced by appellee here (Br. 46-47)—that blocking devices "can be mailed to subscribers thereby obviating the need for installation labor costs and lowering the cost per mechanism to the cost of the product plus postage." J.S. App. 22a n.21. Our demonstration that an enhanced Section 504 would be (at least) as speech-restrictive as Section 505 rested on the district court's factual findings; appellee's argument to the contrary is based entirely on a rejection of those findings.

presumably would apply only to sexually explicit programming services like appellee's. Moreover, if those requirements were added to Section 504, appellee would no doubt argue (as it has with respect to Section 505) that they impose an impermissible economic burden on its speech and have other First Amendment defects as well.

D. Appellee's Other Arguments Should Be Rejected

Appellee advances a number of additional arguments—distinct from those relied upon by the district court—in support of its contention that Section 505 is unconstitutional. None of them are persuasive.

1. Appellee argues (Br. 20-21) that the First Amendment analysis here is governed not by *Pacifica*, but by *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1976), in which the Court held unconstitutional an ordinance forbidding drive-in theaters from showing movies containing nudity visible from a public street. As we explain in our opening brief (at 23 n.14), the Court in *Erznoznik* quite explicitly relied on the fact that the ordinance in that case "is not directed against sexually explicit nudity, nor is it otherwise limited," 422 U.S. at 213—unlike Section 505, which is directed *only* at sexually explicit programming. The fact that "a contemporaneous reference to *Erznoznik*" written by a "legal expert" (Appellee's Br. 21 n.22) described the ordinance (in contradiction of this Court's opinion) as directed only toward sexually explicit materials is obviously of no significance in construing this Court's holding. Nor does appellee offer any explanation of the other significant difference between this case and *Erznoznik* that reinforces the authority of Congress to enact Section 505: Section 505, unlike the drive-in movie regulation in *Erznoznik*, is directed at sexually explicit programming that intrudes, uninvited, into the privacy of the home.

2. Appellee argues (Br. 33-34) that this case is controlled by the Court's holding in *Denver Area* that Section 10(b) is unconstitutional. Section 10(b) provided that those who transmit indecent material on leased-access cable channels must

segregate such material on a separate channel and block that channel unless a subscriber specifically requests access to it in writing, a procedure that could result in a waiting period of up to 30 days to begin receiving service. The Court's holding regarding Section 10(b) is inapposite here, for four reasons.

First, the basis for the Court's holding regarding Section 10(b) was that alternative means were available to protect minors from indecency. See *Denver Area*, 518 U.S. at 756-759. Prominently featured among those alternative means was Section 505. See *id.* at 756. The Court's holding in *Denver Area*, therefore, rested on at least the possibility that Section 505 is constitutional; it therefore could not establish, as appellee argues, that Section 505 violates the First Amendment.

Second, Section 10(b)—unlike Section 505—did not allow for any “safe harbor” for transmitting indecent material at night. Accordingly, Section 10(b) imposed a far more stringent, and unnecessarily broad, restriction on speech than does Section 505.

Third, Section 10(b) in essence required that certain channels previously available to all viewers would thenceforth be available only by subscription. It thus directly interfered with the desired communication between cable operators and programmers, on the one hand, and their viewers, on the other. By contrast, Section 505 addresses the problem of signal bleed, which arises only with respect to channels that are already available only by subscription. And Section 505 permits the communication between appellee and its subscribers to continue without interference, so long as appellee does not thereby pose a threat to third parties (children viewing and listening to signal bleed, or adults seeking to preserve the privacy of their homes) with whom appellee has never asserted a First Amendment interest in communicating. See J.S. App. 42a (“[Appellee] do[es] not contend that signal bleed itself is protected speech.”).

Finally, Section 10(b), unlike Section 505, required that subscribers must apply in writing to receive indecent programming on access channels and included several delays of up to 30 days that would further burden subscribers and programmers. The Court in *Denver Area* noted that those requirements would have “obvious restrictive effects,” because they would put the indecent access programming out of the reach of occasional or casual viewers, and because the written notice requirement “will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the ‘patently offensive’ channel.” 518 U.S. at 754. See also *id.* at 807 (Kennedy, J., concurring) (noting “constitutional infirmity of requiring persons to place themselves on a list to receive programming”). Section 505 imposes none of those burdens, and consequently is far less restrictive than Section 10(b) in this respect as well.

The plurality in *Denver Area* emphasized that its decision was highly context-specific. Because Section 505 differs so substantially from Section 10(b), the Court's specific holding in *Denver Area* that Section 10(b) is unconstitutional is not controlling here.

3. Appellee contends repeatedly that Section 505 is unconstitutional because “the government failed to demonstrate that signal bleed is a ‘pervasive problem.’” Br. 31; see *id.* at 16, 30-31, 35, 43, 45. Appellee's premise is mistaken. Congress's power to protect children from sexually explicit material on television is not limited to instances in which such material presents a “pervasive problem.” In *Pacifica*, the Court held that the FCC could “proscribe this particular broadcast,” 438 U.S. at 742, without requiring any showing that similar broadcasts pervaded the medium. Nor could such a showing have been made in that case. See *Reno*, 521 U.S. at 867 (program in *Pacifica* was “a dramatic departure from traditional program content”). Although it is no doubt true that Congress may not act to protect children from

sexually explicit programming with a measure like Section 505 unless there is a real problem being addressed, Congress need not wait until that problem pervades the entire medium before acting.

In any event, the problem of signal bleed is widespread. The district court found that most cable operators use a technology that leaves the audio portion of appellee's sexually explicit programming entirely audible. J.S. App. 7a-8a. Appellee cannot—and does not—deny that the audio portions of its programming are as sexually explicit as the video. In fact, in addition to the “assorted orgasmic moans and groans” to which the district court referred (and which are a staple of appellee's programming, *id.* at 52a-53a), the sound tracks of many of its programs not only make frequent use of the “seven dirty words” from *Pacifica*, but do so in the very coarse context of graphic depictions of individuals engaged in sexual intercourse and other explicit sexual acts, rather than in the relatively sanitized context of the satire/ social commentary before the Court in *Pacifica*.¹⁰ Accordingly, the district court's finding that audio signal bleed is prevalent is sufficient to show that the problem Congress was addressing is very widespread.

With respect to the video portion of appellee's programming, too, the district court's findings establish that Congress was addressing a widespread problem. The record contains substantial anecdotal evidence of signal bleed in a wide variety of circumstances. See Gov't Br. 6-7.¹¹ Nothing

¹⁰ As a sample of the audio signal bleed that the district court found to commonly occur, we urge the Court to review the tapes that we have lodged with this court or any of the other tapes of appellee's programming that are a part of the record in this case. We have been informed that those tapes have been received by the Clerk of this Court, together with the other record materials.

¹¹ See also 141 Cong. Rec. 15,587 (1995) (Sen. Feinstein) (noting that “partially scrambled video pornography—replete with unscrambled and sexually explicit audio—was being automatically transmitted to more than 320,000 cable television subscribers” in San Diego, California, and the sig-

nal was transmitted “only one channel away from a network broadcasting cartoons and was easily accessible for children to view”); see also DX 1 (videotape lodged with Clerk of this Court). As the district court explained, the government's evidence showed that there was the potential for signal bleed in 39 million homes with more than 29 million children. J.S. App. 10a.

Indeed, an examination of the operation of Section 505 reveals that it imposes a burden on speech that is well tailored to the scope of the problem of signal bleed on a given system. If signal bleed does not occur on a system, then Section 505 imposes no restriction on speech on that system at all. If signal bleed occurs sporadically, due to defects in “the quality of the [cable operator's] equipment, its installation, and maintenance,” J.S. App. 9a, Section 505 requires only

nal was transmitted “only one channel away from a network broadcasting cartoons and was easily accessible for children to view”); see also DX 1 (videotape lodged with Clerk of this Court). As the district court explained, the government's evidence showed that there was the potential for signal bleed in 39 million homes with more than 29 million children. J.S. App. 10a.

¹² We disagree with appellee's contention that the district court found that the government had failed to prove the pervasiveness of signal bleed. Appellee refers (Br. 16, 31, 35) to the district court's statement that “the Government has not convinced us that [signal bleed] is a pervasive problem.” J.S. App. 36a. The very next sentence in the court's opinion, however, is that “[p]arents may have little concern that the adult channels be blocked.” *Id.* at 36a. Read together, the two sentences indicate only that the court believed that the government had not convinced the court that parents (who are likely not to know of the problem) generally perceived that there is a substantial threat that their children would be exposed to signal bleed or that they should take affirmative steps to block it; the district court was not contradicting its earlier findings, discussed in text, that audio signal bleed is common and video signal bleed is an ever-present danger on the majority of cable systems in operation today.

that the cable operator correct the defects. But if signal bleed occurs with regularity, as the evidence suggests it does, then a cable operator may decide that the only effective solution is time-channeling. Regardless of how often signal bleed occurs on a given system, therefore, the burden imposed under Section 505 is closely commensurate with the scope of the problem.¹³

* * * * *

For the foregoing reasons and those stated in our opening brief, the decision of the district court should be reversed.

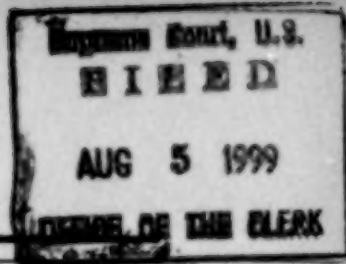
Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1999

¹³ On the jurisdictional issue, appellee raises only one new point that we have not already answered in our opening brief (at 41-44). Appellee asserts (Br. 49) that an order granting appellants' Federal Rule of Civil Procedure 59(e) motion, which sought to confine the judgment to appellee Playboy (the only plaintiff remaining in the case), "would have essentially nullified Playboy's facial challenge to Section 505." That is incorrect. The legal basis for a particular plaintiff's challenge to a regulation or statute (*e.g.*, on-its-face as distinguished from as-applied) is distinct from the relief to which the plaintiff is entitled if that challenge is successful. Absent a special statutory review provision allowing a single party to obtain a judgment setting aside a regulation or restraining enforcement of a statute in its entirety (see, *e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 728-729 (1999); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)), a plaintiff is entitled only to a judgment that declares the challenged provision unlawful or enjoins its enforcement or application as to that plaintiff. See, *e.g.*, *United States Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891, 894 (1990). In that event, the collateral estoppel effect of the judgment is limited to the particular plaintiff before the court. See *United States v. Mendoza*, 464 U.S. 154 (1984). Of course, once this Court renders a decision concerning the validity of a regulation or statute, even in a case brought by a single party, the precedential effect of this Court's decision will bind the lower courts in cases brought by other plaintiffs, quite aside from principles of collateral estoppel.

(4)
No. 98-1682



In the
Supreme Court of the United States
October Term, 1998

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF DELAWARE

**BRIEF OF FAMILY RESEARCH COUNCIL, MORALITY IN
MEDIA, NATIONAL LAW CENTER FOR CHILDREN AND
FAMILIES, NATIONAL COALITION FOR THE PROTECTION
OF CHILDREN AND FAMILIES, AND CONCERNED WOMEN
FOR AMERICA
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*

The Family Research Council ("FRC"), Morality in Media, Inc. ("MIM"), National Law Center for Children and Families ("NLC"), Concerned Women for America ("CWA"), and National Coalition for the Protection of Children & Families ("NCPCF"), as *amici curiae*, file this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37.

The Family Research Council is a non-profit public policy organization dedicated to preserving the traditional family and to preserving and promoting traditional family values and the Judeo-Christian principles upon which it is built. Charles A. Donovan is Executive Vice President and acting C.E.O. and Janet M. LaRue, Esq., is Senior Director of Legal Studies.

FRC seeks to protect parents' interest in protecting their minor children from accessing pornography through all media, including the Internet and the government's compelling interest in assisting parents to do so. Our legal and public policy experts are continually sought out by federal and state legislators for assistance and advice on efforts to prevent children from accessing such material and the serious harms that befall children who do access such material.

FRC has filed *amicus curiae* briefs in this Court and in other federal and state courts involving First Amendment issues, including: *Alliance for Community Media, et al., v. FCC*, No. 95-227 (consolidated with *Denver Area Educ. Telcoms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (cable indecency); *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (*Communications Decency Act*, "CDA"); *ACLU, et al., v. Reno*, No. 99-1324 (3rd Cir. 1999). FRC's Senior

Director of Legal Studies (Counsel of Record herein) has also filed briefs with this Court, *Knox v. U.S.*, (child pornography); *Crawford v. Lungren*, 520 U.S. 1117 (1997) (material harmful to minors); and in other federal and state courts involving First Amendment issues, *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996) (material harmful to minors); *State v. Stoneman*, 323 Ore. 536; 920 P.2d 535 (1996) (child pornography); and *People v. Wiener*, 29 Cal. App. 4th 1300; (1994) (obscenity).

Morality in Media has a special interest in this case because it was one of the organizations that assisted Congress in formulating this legislation and the Justice Department in preparing viewer testimony for the preliminary hearing and trial. The interest of this *amicus* sprang from its experience in responding to complaints of signal bleed by citizens in various states. MIM is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 58 nn.7-8 (1973). More recently MIM has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491

(1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); and *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

National Law Center for Children and Families is a Virginia, non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States and in several foreign countries. The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses. NLC has filed numerous friend of the court briefs in this Court and in other federal and state cases involving First Amendment issues, including: *Alexander v. United States*, 509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *Knox v. United States*, 510 U.S. 939 (1993), *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), and *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), and *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for magazines harmful to minors); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996) (computer BBS obscenity); *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998) (prison pornography regulations); *Free Speech Coalition v. Reno*, (N.D. Cal. 1997), unpublished, No. C97-028SC, 1997 WL 487758, and Ninth Circuit No. 97-16536 (argued Mar. 10, 1998) (computerized child pornography, 18 U.S.C. § 2252A); *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Pa. 1996)

(Communications Decency Act, "CDA"); *City of National City v. Wiener*, 838 P.2d 223 (Cal. 1992) (sexually oriented business zoning); and *State v. Harrold*, 539 N.W.2d 299, (Neb. 1999) (obscene act on public access cable TV). NLC's Chief Counsel has also filed several briefs with this Court, including: *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (obscenity nuisance); *California v. Freeman*, 488 U.S. 1311 (1989) (prostitution in pornography production); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (RICO-obscenity); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (sexually oriented business regulation); *Reno v. ACLU*, 521 U.S. 844 (1997) (*Brief for Members of Congress re: CDA*), and presented oral argument to this Court in *Flynt v. Ohio*, 451 U.S. 619 (1981).

The National Coalition for the Protection of Children & Families hereby joins as an *amicus curiae* in this brief because it agrees with FRC, MIM, and the NLC that this Court should consider the arguments and submissions contained herein and it agrees that this brief raises important concerns for its members, for this Honorable Court, and for all Americans.

The NCPCF was founded in 1983. It assists concerned citizens and community leaders in efforts to significantly reduce sexual exploitation and violence by (a) increasing public awareness of the harm and availability of exploitative and abusive pornography, particularly in the lives of children; (b) supporting the enactment and enforcement, within the parameters of the Constitution, of limitations on pornography; and (c) offering assistance to people whose lives pornography has harmed.

NCPCF programs are carried out nationally and include resource development and distribution (including a wide range of research reports documenting the harms of

pornography); victim assistance (including seminars for the training of counselors, therapists, and church pastors who are directly involved with helping addicts, spouses of addicts, and victims and survivors of sex abuse); and assistance and training to law enforcement.

Concerned Women for America hereby joins as an *amicus curiae* in this brief because we agree with FRC, MIM, and the NLC that this Court should consider the arguments and submissions contained herein and it agrees that this brief raises important concerns for its members, for this Honorable Court, and for all Americans. CWA is a national, non-profit membership organization representing approximately 600,000 people.

The purpose of CWA is to preserve, protect, and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values. CWA is concerned about the increasing availability of pornography and the lack of enforcement of existing laws. CWA is concerned about the morally deteriorating condition of the entertainment industry in our country and the increasing emphasis on violent and sexually exploitative programs.

CWA works to reduce the alarming amount of violence which occurs in American families each year, particularly the high incidence of child, spouse, and elder abuse. Finally, CWA works to educate the public on laws restricting the use and sale of pornography and the need to reduce family violence, especially the sexual abuse of children.

Amici believe that the problem of uninvited sexually explicit or indecent material via signal "bleed" is egregious and violates the privacy rights of adults and children and is harmful to children. The Court's decision in this case will

have a lasting effect on the Government's ability to effectively address this invasive nuisance. *Amici* are filing this brief in support of the United States because we believe our brief contains relevant matter and alternative arguments that should be heard and may not be presented to the Court by the parties.

CONSENT TO FILE BRIEF

The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

SUMMARY OF ARGUMENT

Amici assert that Section 505 of the Telecommunications Act of 1996 (CDA), § 505, 110 Stat. 136 (47 U.S.C. 561 (Supp. III 1997)), is a regulation directed at signal bleed, a secondary effect of the transmission of sexually explicit or indecent "speech." *Amici* contend that it was error for the District Court to have ultimately determined Section 505 to be a content-based restriction on speech in light of their agreement with *amici* that the regulation at issue has a content-neutral objective. *Playboy Entertainment Group, Inc. v. United States, et al.*, 945 F.Supp. 772, 785 (D. Del. 1996) (denying preliminary injunction), *aff'd*, 117 S. Ct. 1309 (1997) ("*Playboy I*"). *But see Playboy Entertainment Group, Inc. v. United States, et al.*, 30 F.Supp.2d 702 (D. Del. 1998) (granting permanent injunction) ("*Playboy II*").

Amici provide several bases for this Court to uphold the constitutionality of Congress' ability to regulate such signal bleed through Section 505. Maintaining that signal bleed is not protected speech, *amici* argue that it should be prohibited under the nuisance doctrine. Alternatively, as a content-neutral regulation, it is proper to apply time, place, and manner analysis. Even assuming, *arguendo*, that *Playboy's* signal bleed is "speech" to which some minimal protection applies, at most, intermediate level of scrutiny applies. Further, *amici* submit that, under *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), when faced with a developing technology, strict scrutiny and least restrictive means are not always appropriate, as in this case.

If, however, this Court should find Section 505 to be a content-based regulation, requiring strict scrutiny analysis, *amici* would argue that it passes constitutional muster since it is narrowly drawn, provides the least restrictive, yet effective, means available to accomplish the Government's

compelling interests in protecting children and the privacy of the home from harmful, intrusive, explicit sexual performances of clearly pornographic character.

ARGUMENT

I. SIGNAL BLEED IS NUISANCE SPEECH WHICH IS WITHOUT FIRST AMENDMENT PROTECTION

In *Playboy Entertainment Group, Inc., et al., v. United States, et al.*, 945 F.Supp. 772, 774 (D. Del. 1996), *aff'd*, 117 S. Ct. 1309 (1997), the District Court, in denying Playboy's request for a preliminary injunction, stated: "Our analysis is narrowed by the fact that plaintiffs do not contend that signal bleed itself is protected speech." *Amici* agree. Section 505 regulates signal bleed, which all parties and the Court below agree is a content-neutral objective. *Playboy II*, 30 F.Supp.2d at 714.

This Court has stated that there are narrowly limited classes of speech which are not protected by the First Amendment. One such class is "nuisance speech." *Amici* contend that Playboy's signal bleed may be found to constitute a nuisance on several grounds: 1) the signal bleed invades privacy and the sanctity of the home; 2) is indecent; or 3) exposes children to material which is harmful. Thus, Playboy's signal bleed represents an even greater harm than signal bleed which is sexually explicit but not indecent.

This Court first alluded¹ to "nuisance speech" as a class of unprotected speech in *Chaplinsky v. New Hampshire*, 315 U.S. 558, 571-72 (1942), where the Court stated:

¹ *Amici* say "alluded" because the Court, while not specifically mentioning nuisance speech, twice cites the book, *Free Speech in the*

There are certain, well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The "nuisance speech" doctrine was also at issue in *Kovacs v. Cooper*, 366 U.S. 77 (1949), where this Court upheld ordinances aimed at certain means of communication that intrude uninvited into the privacy of the home. The Court stated at 87, 89:

In his home . . . he is practically helpless to escape the interference with his privacy by loud speakers. . . . That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call for

United States, by Zechariah Chafee, Jr. (1941), which does so at pp. 149, 150:

But the law also punishes a few classes of words like obscenity, profanity . . . because the very utterance of such words is considered to inflict a present injury upon listeners, readers . . . This is a very different matter from punishing words because they express ideas thought to cause future danger to the state. . . . [P]roperly limited they fall outside the protection of the free speech clauses. . . . [P]rofanity, indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young and the peace of mind of those who hear or see. . . . The man who swears in a street car is as much of a nuisance as the man who smokes there. [Emphasis added.]

constitutional protection for what those charged with public welfare reasonably think is a nuisance.

Amici argue that "substantial privacy interests have been invaded in an intolerable manner", *Cohen v. California*, 403 U.S. 15, 21 (1971), and that it is patently demonstrative that explicitly sexual language and depictions that are uninvited, that invade the privacy of the home, and that are readily accessible to children, are an obvious example of nuisance speech.

In *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), this Court recognized the applicability of the "nuisance speech" rationale to the broadcast media when it affirmed a FCC ruling which held that the monologue, "Filthy Words", as broadcast, was indecent and within the reach of 18 U.S.C. § 1464. This Court observed that the Commission's decision "rested entirely on a nuisance rationale under which context is all important" and compared the indecent broadcast to a "pig in a parlor instead of the barnyard." *Id.*

In the case currently before the Court, Playboy's pig has invaded the parlors of homes all across this country. Congress intended Section 505 to return the pig of "nuisance speech" to the barnyard, where only consenting adults may view and hear it. Therefore, *amici* contend that indecent sexual signal bleed which intrudes into the privacy of the home and is readily accessible to children amounts to "nuisance speech" which Congress can prohibit or regulate without having to confront the First Amendment.

II. SIGNAL BLEED IS NOT PROTECTED SPEECH; RATHER, IT IS AN ADVERSE SECONDARY EFFECT OF THE MANNER OF CABLE TRANSMISSION, AND SHOULD

THEREFORE BE HELD TO A TIME, PLACE, AND MANNER STANDARD OF ANALYSIS

Amici contend that the District Court erred in holding the statute to be a content-based restriction on speech, in that it applies only to the transmission of sexually explicit adult programming or other programming that is indecent. *Amici* maintain that no evidence has been presented in this case supporting the contention that Section 505 is designed to promote some speech and not others. On the contrary, the language of the statute is clear, i.e., regardless of whether the sexually explicit material is medical, scientific, critically important, or mere entertainment in nature, the statute applies equally. The fact the statute reaches any and all types of sexually explicit material, regardless of its point of view or message, is critical. This point does not disappear merely because Playboy avoids addressing it. It is also important to note that Section 505 does not in any way seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing indecent material on premium cable channels they subscribe to.

Central to the determination of content-neutrality is your *amici*'s position that Section 505 is not aimed at the speech found on the Playboy Channel, nor does it attempt to regulate the kind of material that Playboy may broadcast on its channel. Instructive on this issue is *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), where a city ordinance regulating where adult films could be shown was at issue. In that case, this Court stated at 71-72:

What is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content.

Similarly, Section 505 uses the nature of Playboy's programming to determine if its signal bleed fits within the scope of the statute, in order to scramble the signal bleed in homes that have not subscribed to this adult channel which is transmitting unwanted sexual images and sounds. Based on the fact Section 505 regulates signal bleed, not speech itself, this Court should apply a time, place, and manner standard of review, not strict scrutiny.

Having argued above that Section 505 is a content-neutral regulation, regulating only the manner in which speech is communicated, *amici* contend that the Court need determine only if the regulation is "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

Playboy's argument centers around the erroneous premise that, because Section 505 impacts their business of distributing sexually explicit material, it must be aimed at the product being offered by that business and is, therefore, an unconstitutional content-based regulation. *Amici* assert that, based on this Court's prior rulings in the area of zoning, Playboy's assertion has no merit. Most notably, in *Renton*, the Court found that regulations directed at "secondary effects" are proper even where they have an incidental impact on the communication of protected speech. *Renton*, at 47; *Young v. American Mini Theatres, Inc.*, *supra*; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). See also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (Justice Souter, concurring).

A. The Government's Interests are More Than Substantial, They are Compelling

As recognized by the District Court in *Playboy II*, 30 F.Supp.2d at 715, Congress asserted several substantial interests in regulating signal bleed:

[T]he well-being of the nation's youth—the need to protect children from exposure to patently offensive sex-related material; . . . in supporting parental claims of authority in their own household—the need to protect parents' rights to inculcate morals and beliefs on their children; and . . . in ensuring the individual's right to be left alone in the privacy of his or her home—the need to protect households from unwanted communications.

It is well established that Congress has not only a substantial interest, but a compelling interest, in the protection of children from sexually explicit material, especially in the context of a pervasive medium. See *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996); *Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968) ("The State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'"). See also *Sable Communication of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." Further, Justice Scalia, at 132, stated in his concurrence that "[T]he more pornographic [the material] embraced within the . . . category of 'indecent,' the more reasonable it becomes to insist upon greater assurance of insulation from minors.")

The *Ginsberg* Court, at 639, recognized another substantial governmental interest in supporting parental claims of authority in their own household, stating:

The parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid in the discharge of that responsibility.

Amici further maintain that Congress is justified in regulating signal bleed based on the substantial governmental interest in ensuring an individual's right to be left alone in the privacy of his or her home. Section 505 regulates imperfect signal scrambling to homes of families who do not subscribe to sex-dedicated channels. These images enter as an offensive pollutant. *Playboy I*, 945 F.Supp. at 787. Millions of children now have access to indecent sounds of adult sexual activity, which was a concern raised in *Pacifica*, and also, with cable television, they see sexually explicit visual images of nude private parts and sex acts. As stated by this Court in *Pacifica*, 438 U.S. at 748:

Patently offensive, indecent material presented over the airwaves confronts the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.

Based on the above substantial and compelling governmental interests, which courts have consistently held to justify regulations that protect children from explicit sexual material that is harmful as to them, *amici* would argue that parents are due government's support in shielding their children's eyes from the pruriently presented naked body parts that appear through the signal bleed of Playboy's cable

channel into homes that specifically refuse to subscribe to such "adult" programming.

B. Harms To Children From Exposure To Signal Bleed

Amici assert that viewing signal bleed of sexually explicit programming is harmful to children. As noted by the Court below, in *Playboy II*, 30 F.Supp.2d at 715: "The Supreme Court has not required empirical proof of harm to justify content-based restrictions on constitutionally protected speech where children are involved." As stated by the Court of Appeals in *Action for Children's Television v. FCC*, 58 F.3d 654, 661-62 (D.C. Cir. 1995) (*en banc*), Congress is not required to provide a "scientific demonstration of psychological harm . . . in order to establish the constitutionality of measures protecting minors from exposure to indecent speech."

Amici assert that one area of harm to children from viewing such explicit sexual activity is the manner in which children learn about sexuality, such that it glorifies the "free-sex" lifestyle. See U.S. Department of Justice, *Attorney General's Commission on Pornography, Final Report*, July 1986, at 339, 343-44. In addition to the harms to minors from viewing this material, *amici* also maintain there is harm from its mere availability to them. Indeed, the easy availability of sexually explicit material may well have the perverse effect of *encouraging* some children to access such material. See *Ginsberg*, 390 U.S. at 642 n. 10 ("To openly permit [reading of pornography] implies parental approval and even suggests seductive encouragement. . . . This apparent stamp of approval on sexually explicit material is detrimental to a child's own sexual development.")

C. Alternative Avenues are Available for Sexually Explicit Speech

The second part of a time, place, and manner standard of review requires there to be alternative avenues of communication available for the dissemination of the type of speech at issue. *Amici* argue that requiring programmers of sexually explicit material to completely scramble their signal does not prevent Playboy from broadcasting its sexually explicit programming to its consenting cable subscribers. Therefore, Section 505 leaves open alternative avenues for Playboy's sexually explicit communications. Since there are alternative avenues for Playboy's speech, and the Government's interests are clearly substantial, the signal-bleed regulation embodied in Section 505 should be held valid under the standard of analysis applied to content-neutral time, place, and manner regulations of the adverse secondary effects of cable transmission. This analysis would also satisfy an intermediate level of scrutiny to test any minimum expressive element of sexual signal bleed, even assuming such analysis were appropriate. See *Barnes v. Glen Theatre, Inc.*, *supra*.

III. EVEN ASSUMING, ARGUENDO, THAT PLAYBOY'S SIGNAL BLEED IS "SPEECH" WORTHY OF SOME MINIMAL PROTECTION, THIS COURT SHOULD APPLY, AT MOST, AN INTERMEDIATE LEVEL OF SCRUTINY

This Court has established in its prior rulings, that speech which is patently offensive warrants less than full First Amendment protection. Beginning with *Pacifica*, *supra*, 438 U.S. at 743, where, as here, we have a mixed audience of adults and children, this Court stated, relative to indecent broadcasts:

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. [Emphasis added.]

Further, as the Court stated in *Young v. American Mini Theatres*, *supra*, 427 U.S. at 61, 66:

[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance. . . . Even within the area of protected speech, a difference in content may require a different governmental response.

And again in *American Mini Theatres*, at 70:

[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate . . . few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities". . . . Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures. [Emphasis added.]

In *New York v. Ferber*, 458 U.S. 747 (1982), the Court found that the New York child exploitation statute would have little impact on speech that had serious literary, artistic, political, or scientific value. Justice White, who delivered the opinion of the Court, wrote at 762, 763-64:

The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. We consider it unlikely that visual depictions of child performing sexual acts or lewdly exhibiting their genitals would often constitute an important necessary part of a literary performance or scientific or educational work. . . . [A] content-based classification has been accepted because . . . within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.

Concurring in judgment, Justice Stevens wrote at 777, 778:

The two films respondent sold contained nothing more than lewd exhibition; there is no claim that the films included material having literary, artistic, scientific or educational value. . . . The question whether a specific act of communication is protected . . . always requires some consideration of both its content and context.

In *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), where less sexually explicit activities were at issue than those depicted on Playboy's cable channel, Chief Justice Rehnquist, writing the majority judgment and primary opinion for the Court, stated at 565:

[Several of our cases contain] statements support[ing] the conclusion of the Court of Appeals that nude dancing of the kind performed here is expressive conduct within the outer perimeters of the First Amendment, though we view them as only marginally so.

Concurring in the judgment, Justice Souter wrote at 584-85:

Given our recognition that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled debate" . . . I do not believe that a State is required affirmatively to litigate the issue repeatedly in every case. [quoting *American Mini Theatres*, 427 U.S. at 70.]

In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992), Justice Scalia, delivering the opinion of the Court, stated:

From 1791 to the present . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [quoting *Chaplinsky*, 315 U.S. at 372.]

Amici maintain that the twin requirements of Section 505, that programming be indecent and be carried on a channel "primarily dedicated to sexually oriented programming," effectively guarantee that only a narrow

category of sexually explicit or indecent expression will be affected.²

Amici note that this Court in *Pacifica* distinguished broadcasting from other speech and that broadcasting "has received the most limited First Amendment protection." 438 U.S. at 748. This Court put forth two rationales in support of this lesser level of protection, stating, at 748-49:

First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment right of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected programming content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent

² In this regard, Section 505(a) is similar to the Ensign Amendment, which bars use of U.S. Bureau of Prisons funds to pay for commercial material that is "sexually explicit or features nudity." [Emphasis added.] Bureau regulations define "features" to mean, in part: "the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis." In upholding the Ensign Amendment, the Court of Appeals for the D.C. Circuit in *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998), *cert. denied*, 119 S.Ct. 2392, wrote at 202:

In any event, even under conventional overbreadth doctrine outside of prison, overbreadth claims by those on the margins of pornography have fared poorly. *See, e.g., Young v. American Mini Theatres*, 427 U.S. 50, 61 (1976) ("Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance").

phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Amici argue that the uninvited broadcast in *Pacifica* is analogous to Playboy's signal bleed in the present case, because Playboy's sexually explicit or indecent programming trespasses into the homes of non-consenting adults who receive cable television from cable companies that do not fully scramble their programming. These adults are faced with Playboy's forcing this type of unwanted speech upon them, which is a flagrant violation of the right to be left alone in the privacy of one's own home. Section 505's regulation of signal bleed does not prohibit Playboy from showing its sexually explicit or indecent programming, it merely prohibits them from showing it to those who do not wish to view it.

The second rationale given in *Pacifica* for treating broadcast indecency differently than other forms of speech is that "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. Further, the Court found that "Pacifica's broadcast could have enlarged a child's vocabulary in an instant." *Id.* *Amici* assert that it takes little imagination to know of the lessons a child learns from watching the bleeding signals from the Playboy Channel. Such "Picasso porn" is surely not a proper art class. In fact, it has no class at all and is a particularly obnoxious marketing ploy that Section 505 rightfully prohibits being foisted on those who desire to protect themselves and their children from it.

Based on the above analysis, *amici* maintain that it would be inexplicable to give the signal bleed of Playboy's explicit sexual programming the full panoply of protection afforded political speech by holding Section 505 to a strict scrutiny and least restrictive means standard of review. To

do so would be a slap in the face of every decent parent's ability to protect his or her children from unwanted, sexually explicit or indecent material.

IV. WHEN CONFRONTED WITH "DEVELOPING TECHNOLOGIES", DENVER AREA INDICATES THAT STRICT SCRUTINY AND LEAST RESTRICTIVE MEANS MAY NOT ALWAYS BE THE PROPER STANDARD OF REVIEW

In *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), Justice Breyer, writing for the Court, relative to the level of scrutiny applicable to regulating leased access channels, stated at 740-43:

Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect. The history of the Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that "Congress shall make no laws . . . abridging the freedom of speech and the press," has been applied to new circumstances requiring different adaptation of prior principles and precedents. The essence of that protection is that Congress may not regulate except in cases of extraordinary need with the exercise of care that we have not elsewhere required. At the same time, our cases have not left Congress or the States powerless to

address the most serious problems. [Citing *Chaplinsky*, *American Mini Theatres*, and *Pacifica*.]

Over the years this Court has restated and refined basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application...This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, but without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems. This Court in different contexts has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech. Justices Kennedy and Thomas would have us further declare which, among the many applications of the general approach that this court has developed over the years, we are applying here. But no definitive choice among the competing analogies (broadcast, common carrier, bookstores) allows us to declare a rigid single standard, good for now and for all future media and purposes. . . . Aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications...we believe it unwise to pick one analogy or one specific set of words now. . . . Rather than decide these issues, we can decide these cases more narrowly, by closely scrutinizing Section 10(a) to assure that it properly addresses an extremely important problem, without imposing in light of the relative interests, an unnecessarily great restriction on speech. [Emphasis added.]

Amici assert that, in the instant case as in *Denver Area*, Playboy's signal bleed is, at most, sexually explicit material on the periphery of the First Amendment, involving a developing technology, presenting extremely important governmental interests, and regulated by a viewpoint-neutral application. *Denver Area* instructs a balancing of competing interests and, on balance, *amici* maintain that Congress found that the interests in protecting children from exposure to sexually explicit or indecent programs, supporting parental claims of authority in their own household, and ensuring an individual's right to be left alone in the privacy of his or her home, far outweighs any inconvenience to content providers or adult users.

Amici also argue that "Signal Bleeders" must bear responsibility for invading the privacy of the home and exposing children and non-consenting adults to sexually explicit or indecent programming. Further, any expense commercial distributors must bear is part and parcel of the cost of doing business in their pursuit of profit. This is no different from the costs born by "adult" bookstore or video store operators who are required to shield the public, and children in particular, from exposure to their sexually explicit materials. There is no constitutional right to enjoy an idealized profit margin at the expense of public health and safety. See *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 125 (1989). As *Renton* also teaches us, speakers may be faced with the cost of purchasing or leasing available "adult use" sites, but such regular cost of business is no barrier to regulation in the public interest. Quoting Justice Powell in *American Mini Theatres*, 427 U.S. at 78, the Court in *Renton*, 475 U.S. at 54, stated: "The inquiry for First Amendment purposes is not concerned with economic impact."

The District Court below, in granting Playboy's request for permanent injunctive relief, held Section 505

invalid, finding it not to be the "least restrictive means." 30 F.Supp.2d at 720. *Amici* contend that, under *Denver Area*, it is not necessary to apply the concept of "least restrictive means," but instead to recognize that Section 505 "properly addresses an extremely important problem, without imposing in light of the relative interests, an unnecessarily great restriction on speech."

Amici urge this Court to reject the District Court in applying rigid formulae, but, rather, to apply scrutiny only to the extent of determining that the law properly addresses an extremely important problem without imposing an unnecessarily great restriction on any protected speech. *Amici* maintain that the economic expense to Playboy in having it and its cable operator partners be responsible for scrambling the signal bleed of unwanted sexually explicit materials (which is, at most, on the borderline of protected speech) is not an unnecessarily great restriction on the Playboy Channel. Congress has addressed the extremely important problems of such activities being seen and heard by non-consenting adults and by children, against the will of their parents, who did not subscribe to such programming. These *amici* pray that the balance be weighed in favor of children and families and not in favor of the Signal Bleeders who profit from the titillating advertising effect of their bleeding signals.

Further, no adult subscriber is inconvenienced or affected by this law's provisions. If an adult subscribes, the adult gets Playboy. If an adult does not subscribe, he should not be heard to complain that he doesn't get free partial samples. However, even if an adult were inconvenienced by not having the free teasers of signal bleed images, both *Pacifica* and *Denver Area* would caution us that adults are not stopped from finding similar material elsewhere on videos, in theaters, or in "adult" porn shops. As this Court can take judicial notice, today such pornography-seeking

adults can find Playboy pictures and countless hard-core depictions through the Internet. With such availability, *amici* assert that Section 505 cannot be said to impose, in this manner, "a great restriction on speech" as indecent material is plentiful and readily available to adults elsewhere.

Amici would assert that, under *Renton*, there is an additional reason not to apply "strict scrutiny" and "least restrictive means" since we are similarly dealing with a law that regulates expression supposedly intended only for a consenting adult audience. Section 505 is concerned, not with the impact of speech on its intended audience, but rather with the "spill over effects" of the signal bleed on children and the quality of life of those who do not choose to be exposed to it. *Amici* note that, in this regard, *Renton* and the instant case are distinguishable from *Boos v. Barry*, where that law at issue in that case did "focus *only* on the content of the speech and the direct impact that speech has on its" audience. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

In *Connection Distributing Co., v. Reno*, 154 F.3d 281 (6th Cir. 1998), the Court of Appeals concluded that the labeling and record-keeping provisions of 18 U.S.C. § 2257, which apply only to those who produce sexually explicit visual depictions, were content neutral. That Amendment, wrote the Court of Appeals, "is not directed at the protected speech but rather unprotected conduct, namely child pornography." *Id.* at 290.

Similarly, Section 505 is not directed at the distribution of presumptively non-obscene speech to consenting adults, but rather at unprotected conduct, namely, the exhibition (either by mistake or as a marketing practice) of such material to children and to non-consenting adults in the privacy of their homes. See *People v. Starview Drive-In Theatre*, 427 N.E.2d 201 (Ill. App. 1981), *appeal dismissed*, 457 U.S. 1113 (1982), where the state Court of Appeals held

valid an ordinance requiring applicants for a license for outdoor movie theaters to agree to desist from exhibiting films containing any scene or scenes depicting acts of "sexually explicit nudity" if "viewable from any private residence." Likewise, signal bleed is indistinguishable from the sexually oriented business which pushes its explicit advertising under the front door of unsuspecting and unwilling homeowners. Just as that conduct is impermissible, signal bleed is also impermissible because of its invasive nature.

V. PLAYBOY'S PROGRAMMING IS NOT SPEECH AND AS SUCH THE COURT SHOULD NOT SUBJECT SECTION 505 TO STRICT SCRUTINY

Playboy makes the argument that, although Section 505 regulates only the signal bleed of its cable channel, the provision is unconstitutional because it adversely impacts on their speech. *Amici* contend that not only is signal bleed not speech, but that it is arguable whether, in fact, Playboy's programming is speech. It is often assumed, for purposes of analysis, that nude dancing in strip clubs and other similar activities are to be judged as if they had some minimal First Amendment protection, as discussed in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991). A court's assuming *arguendo* that certain conduct is speech, for the sake of eliminating claims of value, is different from finding that there is value as a matter of law. Thus, the application of a constitutional test does not compel the conclusion that, in fact, the speech at issue is valuable.

This Court in *Barnes* cited three cases where it had previously found some arguable element of expressive conduct that might be entitled to a level of First Amendment analysis. *Barnes* stated, at 565-66:

Several of our cases contain language that nude dancing of the kind involved here is expressive conduct protected by the First Amendment. In *Doran v. Salem Inn, Inc.*, we said: "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue*, that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." In *Schad v. Mount Ephraim*, we said that "[f]urthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation" (citations omitted). These statements support the conclusion of the Court of Appeals that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so. [Internal citations omitted.] [Emphasis added.]

Most public nudity, obviously, is not expressive speech protected by the First Amendment. This Court continued in *Barnes*, at 570, saying:

It can be argued, of course, that almost limitless types of conduct—including appearing in the nude in public—are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in *O'Brien*, saying: "We cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea." [Internal citation omitted.]

Further, in *Barnes* at 570, the Court also looked to *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), stating:

"It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment."

Amici contend that, if this Court is to ultimately determine that Section 505 impacts upon free speech, it must first make a finding that the signal bleed version of Playboy's cable channel is speech, that it is protected by the First Amendment, and to what degree that expressive conduct is protected by the First Amendment.

Assuming *arguendo* that Section 505's regulation of Playboy's signal bleed is a content-based restriction, impacting on protected speech, and warranting strict scrutiny analysis, *amici* maintain that Section 505 will still pass constitutional muster since Section 505 is narrowly drawn and is the least restrictive means available for addressing Congress's compelling interests in regulating the signal bleed of sexually explicit cable television channels.

VI. WERE THE COURT TO FIND THAT PLAYBOY'S PROGRAMMING CONSTITUTES SPEECH, AMICI CONTEND THAT SECTION 505 IS A NARROWLY DRAWN AND THE LEAST RESTRICTIVE, YET EFFECTIVE, MEANS OF ACCOMPLISHING CONGRESS' COMPELLING INTERESTS

In order for a law regulating speech to be valid under strict scrutiny standard of review, it must be narrowly drawn and utilize a least restrictive means of accomplishing the government's compelling interests. As noted above, this Court has repeatedly recognized government's compelling interest in protecting children from harmful material. See *Ginsberg v. New York*, 390 U.S. 629, 639-41 (1968) and *Sable v. FCC*, 492 U.S. 115, 126 (1989).

In *Dial Information Services v. Thornburgh*, 938 F.2d 1535, 1541 (2nd Cir. 1991), the Court of Appeals stated, "The government is empowered to regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." (quoting *Sable*, 492 U.S. at 126).

Since Section 505 does not "regulate the content" of "adult" cable programming, but merely regulates the signal bleed of such programming, your *amici* submit that the Government could not have chosen to regulate less of Playboy's content and instead has only regulated the signal bleed to the extent necessary to allow subscribers to obtain it and protect non-subscribers from it. As such, Section 505 is already less restrictive than the regulation of "content" which the Second Circuit in *Dial Information Services* said was permissible.

The District Court erred in determining Section 504 to be less restrictive and Section 505, therefore, not to be a least restrictive, yet effective, measure.

Playboy, in attempting to satisfy its burden of showing that there is a less restrictive, yet nearly as effective, means for accomplishing the Government's compelling interests, endorses Section 504 of the same Act as being "less" restrictive. *Amici* disagree that Section 504 should be

compared as a viable alternative to the problem addressed by Section 505. Section 504 is part of, but not all of, the regulations pertaining to signal bleed. Sections 504 and 505 work in tandem to protect household privacy and minors from indecent matter, but differ widely in effectiveness. Section 505 provides complete scrambling or time channeling, so that it does not reach non-subscribers or children, while Section 504 offers the right to request such protection on an affirmative, individual basis from the cable company.

Had Congress passed only Section 505 without the added protection of Section 504, cable customers who are not Playboy subscribers would be unable to avail themselves of complete protection from Playboy's signal bleed during the safe harbor hours had they desired such protection. Likewise, had Congress passed Section 504 without Section 505, cable customers unaware of the protections available through Section 504 would never be protected from Playboy's invasive signal bleed. Since cable programmers could choose to time-channel rather than completely scramble their sexually explicit signal bleed, Congress has, through Section 504, given customers control over what enters their homes by way of their television. *Amici* contend that, if this Court were to hold only Section 504 valid but not Section 505, this would not afford non-subscribing cable customers the complete protection envisioned by Congress.

Amici argue that, if a regulation is to be considered a truly "least restrictive means," that means must be a least restrictive, yet just as effective, measure that still accomplishes Government's compelling interests. It is true that Section 504 is "less" restrictive, to the extent it touches less speech, but only those children whose parents are cognizant of their rights under Section 504 will be protected. Though it may be less "restrictive" in this manner, it instead exposes countless children whose parents do not know of

Section 504 to the harms associated with partially scrambled signal bleed of sexual performances. Therefore, Section 504 does not accomplish the Government's interests in protecting children and the privacy of the home and the comparison should be rejected by this Court as a test of the least restrictive nature of Section 505.

VII. PLAYBOY'S ARGUMENT THAT THE SCRAMBLING PROVISION OF SECTION 505 IS NOT VIABLE AS TO THEM IS NOT PERSUASIVE

The facts offered by Playboy relative to cable scrambling are inconsistent with the common knowledge of the American public. The American public knows that many cable operators can or do completely scramble the pay-per view and premium channels. As Justice Frankfurter stated, "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949). *Amici* urge this Court to similarly take judicial notice of that which is common knowledge to the American public regarding scrambling. This is not a proper or complete record upon which this Court should be asked to strike down a federal statute. The evidence should be considered insufficient as a matter of law in this regard and this Court should remand with instructions for the court below to require the parties to provide a full picture of the technical abilities of cable programmers and cable operators to accomplish with Playboy that which they accomplish with the other premium channels available. *Amici* could not find a logical explanation in this record as to why the Playboy Channel cannot be completely scrambled when so many cable companies already completely scramble Playboy, other "adult" pay-per-view and porn channels, and all other non-adult programming that is not subscribed for, such as the movie and sports channels. These *amici* submit that this record defies logic and common experience and that

this Court should order the record clarified before further review.

Amici maintain that the District Court erred in not requiring the parties to present evidence which would establish an accurate, believable record for why Playboy can or cannot be completely scrambled like other cable programming, such as HBO, Showtime, Cinemax, ESPN2, etc. Therefore, this Court should remand this case and order such findings or have a Special Master appointed who can thoroughly investigate the facts in this area.

VIII. PLAYBOY'S ARGUMENT THAT IT IS TOO COSTLY FOR THEM TO COMPLY WITH SECTION 505 IS ALSO NOT PERSUASIVE

Playboy contends that the "economic impact of § 505 is significant." *Playboy II*, 30 F.Supp.2d at 711. *Amici* would contend that, not only are Playboy's economic claims not sufficiently proven on the record, but that such economic considerations are not germane to deciding the constitutionality of Section 505.

The District Court appeared to agree with your *amici* as to this issue, finding that although Section 505 may have some economic impact on Playboy, "the actual amount of Playboy's losses is of little relevance to our First Amendment analysis." *Playboy II* at 712. *See also Playboy I*, 945 F.Supp. at 783 n.20 (noting that while "Plaintiffs . . . claim that they will suffer economic loss," "[f]inancial loss is not . . . the type of irreparable injury that warrants the granting of injunctive relief"). Accordingly, Playboy's increased costs and decreased profits from time channeling do not provide a sufficient justification of their First Amendment challenge to Section 505. This Court in *Sable*, 492 U.S. at 128, found that the FCC's technical protections through "credit card, access

code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn message out of the reach of minors." (Emphasis added.) This Court has made clear that business costs incurred by providers of patently offensive sexual expression, in order for them to comply with the law, does not itself affect the constitutionality of a statute. *Sable* states, at 125:

While *Sable* may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages.

Amici argue that Section 505 does not deny Playboy access to the adult cable market and that it in no affects the ability of consenting adults to view Playboy's sexually explicit programming. The fact that Playboy is faced with an additional cost of compliance with the regulation is the result of their insistence on an alleged right to take adult material out of an adult bookstore or from an adult section of a retail business (from which minors are excluded), and broadcast it into the homes of non-subscribing cable customers by way of signal bleed. Furthermore, if depriving Playboy of signal bleed would reduce their subscriptions, then the bleeding signal must have commercial value as a marketing ploy to tease adult customers or prime minors into wanting to be customers when they are old enough. If compliance were only a cost factor, and did not affect Playboy's subscription base, then such costs of doing business should not be an excuse to avoid available technology that scrambles the other premium channels. Cable programmers should not be imbued with a constitutional right to show floating private parts and sex acts to children and non-consenting adults as a cheaper means of teasing and reaching a targeted adult audience, if adults are their target audience.

Amici further note that Section 505 offers the alternative of "time channeling" for those cable programmers who truly cannot completely scramble their signal. This Court should not hold a law unconstitutional because those subject to the law will not make as great a profit selling their sexually explicit or indecent material as they would if there were no statute protecting children and the privacy of the home or even a much less restrictive measure to address part of the problem. (If every non-subscribing household with children took advantage of Section 504's individual block box solution, the costs to the cable operators would be so astronomically more than cable system or satellite level scrambling, though Playboy's costs no more, so the economic factor is that much more unreliable for resolving this controversy. This is another proof issue inadequately explored below.)

CONCLUSION

For all of the above, your *amici curiae* pray that this Honorable Court will reverse the judgment of the court below and declare that Section 505 of the Telecommunications Act does not violate the First Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the within Brief for *Amici Curiae* The Family Research Council, Morality in Media, Inc., National Law Center for Children and Families, Concerned Women for America, and National Coalition for the Protection of Children & Families, in Support of the Petitioner in this case were sent by First Class Postage Prepaid, on this 5th day of August, 1999 to:

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IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,

Appellants,

—v.—

PLAYBOY ENTERTAINMENT GROUP, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

**BRIEF AMICI CURIAE OF SEXUALITY SCHOLARS,
RESEARCHERS, EDUCATORS, AND THERAPISTS
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INTEREST OF *AMICI CURIAE*¹

The *amici curiae* are scholars, researchers, educators, and therapists in the field of human sexuality, most of whom hold faculty appointments at major academic institutions. All are members of, and most have been elected officers in, one or more of the major professional associations: the International Academy of Sex Research, the Society for the Scientific Study of Sexuality, the Society for Sex Therapy and Research, and the American Association of Sex Educators, Counselors, and Therapists. Most teach topics pertaining to human sexuality on college or medical school campuses. All have lengthy publication records in the major academic journals of human sexuality research.²

Amici submit this brief in the hope that it may assist the Court in determining whether the government in this case met its burden of establishing a compelling interest in shielding minors from garbled, intermittent, "sexually explicit" or "indecent" cable television signals (so-called signal bleed). Despite what it candidly described as "a paucity" of evidence of psychological harm to minors from

¹ The parties have consented to the filing of this brief and their letters of consent have been filed pursuant to Rule 37.3 of the Rules of this Court. No part of this brief was written or financed by any party other than the *amici*, and the National Coalition Against Censorship (NCAC), a nonprofit organization. The positions advocated by NCAC in this brief do not necessarily reflect the positions of its participating organizations.

² See the individual biographies in the Appendix.

exposure to signal bleed, the district court concluded that the government's burden had been met. In reaching that conclusion, the court erroneously relied upon questionable and controversial moral assumptions, and failed to consider possible harms from restricting access to sexual information and materials.

STATEMENT OF THE CASE

Section 505 of the Telecommunications Act of 1996 (the signal bleed provision) requires cable operators either to scramble fully or relegate to late-night hours any "sexually explicit adult programming or other programming that is indecent" on any channel "primarily dedicated to sexually oriented programming," unless, of course, a household has subscribed to the channel. Playboy Entertainment Group and Graff Pay-Per-View challenged the constitutionality of §505 and sought preliminary relief.

In November 1996, the district court denied their motion for a preliminary injunction. It rejected, as "anecdotal and possibly misleading," the testimony of the government's expert witness, Dr. Diana Elliott, to the effect that signal bleed from sexually explicit programming was actually harmful to minors. It also questioned the reliability of Dr. Elliott's methods. Nevertheless, the court relied upon statements in *Sable Communications v. FCC*, 492 U.S. 115 (1989), and *Denver Area Educ. Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), to rule that the government was likely to meet its burden of showing a compelling need to shield minors from signal bleed. In part

because of the weakness of Dr. Elliott's testimony, the court invited "additional evidence demonstrating the effects of sexually explicit materials on children" in the event that the plaintiffs sought a permanent injunction. *Playboy Entertainment Group v. United States*, J.S. App. 72a n.25, 945 F. Supp. 772, 786 & n. 25 (D.Del. 1996), *aff'd mem.*, 520 U.S. 1141 (1997).

Three experts testified at the permanent injunction hearing: Richard Green and William Simon for the plaintiff,³ and Elissa Benedek for the government. Both Dr. Green and Professor Simon testified that there is no empirical evidence of psychological harm to minors from exposure to sexually explicit videos, no less to signal bleed, and Dr. Benedek did not dispute the point. Tr. at 365-67 (testimony of Richard Green); 539-47 (testimony of Elissa Benedek); 876-77 (testimony of William Simon). See *Playboy Entertainment Group v. United States*, J.S. App. 14a, 30 F. Supp. 2d 702, 710 (D. Del. 1998). Dr. Benedek acknowledged that in her 30 years of psychiatric practice, nobody had come to her with a complaint about either scrambled or unscrambled sexual images. Tr. at 524.

Dr. Green testified that none of the available literature – including comparisons of the amount of erotica available in different countries, studies of sex offenders, laboratory experiments on pornography and violence, clinical experience worldwide, and research on people who as children had witnessed the "primal scene" – supports the

³ Graff had withdrawn from the case. See *Playboy Entertainment Group v. U.S.*, J.S. App. 3a, 30 F. Supp. 702, 705 (D.Del. 1998).

notion that exposure to sexual explicitness is psychologically harmful to youth. In 25 years of clinical practice – much of it with children and adolescents – he had not encountered psychological problems stemming from pornography. “It’s reductionist and simplistic,” Dr. Green said, “to expect that a single variable is going to somehow, in a direct line, lead to some kind of adverse outcome. That’s not the way human development evolves.” Tr. at 361, 365-67, 397.⁴

Despite this absence of empirical or clinical evidence showing “any harm associated with signal bleed,” Dr. Benedek in her testimony “hypothesized” that viewing intermittent sounds or images from sexually explicit programming could lead to “dysphoria” (“a kind of catch word for unpleasant feelings”), bad attitudes, and possible imitative behavior. She explained that “in the vast majority of cases,” these postulated effects “would be transient, or temporary.” To support her hypothesis, she relied upon materials sent to her by the government’s attorneys regarding the effects of television violence, or television more generally, and anecdotes regarding allegedly “traumatic play” in one instance, and children’s use of vulgar language in another, reportedly after exposure to sexual content on television. Dr. Benedek offered no evidence – anecdotal, clinical, or empirical – regarding psychological

⁴ Dr. Green also acknowledged that he had written some 24 years earlier that young children’s “visual experiencing of adult sexuality” could be “potentially confusing and hazardous,” but he testified that studies since then involving adults who as children had witnessed the “primal scene” indicated no adverse effect. Tr. at 418-20.

harm from signal bleed,⁵ and acknowledged that she was not an expert on the effects of erotica, pornography, or television. Tr. at 445-81; *Playboy*, J.S. App. 14a-16a, 30 F. Supp.2d at 710-11.

The three-judge court was no more impressed with Dr. Benedek’s testimony than it had been with Dr. Elliott’s at the preliminary injunction stage. It noted that the government had presented “no clinical evidence linking child viewing of pornography to psychological harms,” but instead had argued, inappropriately, by analogy to studies on TV violence. J.S. App. 29a, 30 F. Supp. 2d at 716.⁶ “The next weakly proven inference,” said the court, was that “the effects of viewing signal bleed of sexually explicit television are the same as viewing sexually explicit television outright.” *Id.* Dr. Benedek’s evidence “on the type and duration of the harm” was “equally troubling.” She

testified concerning transient dysphoria, modeling, and changed attitudes towards sexuality associated with susceptible children viewing explicit pornography. None of her views, however, are derived from observations of exposure to partially scrambled images and sounds of sexual activity. There is

⁵ The district court noted that the government could actually point to “only one such incident,” involving a stomach ache. J.S. App. 14a-15a n.11, 30 F. Supp. 2d at 710 n.11.

⁶ Although not an issue in this case, it should be noted that the psychological and social science literature regarding the effects of television violence on young people is more ambiguous and contested than is frequently assumed.

no evidence in this case that such scrambled, garbled, intermittent signal bleed has a harmful potential similar to explicit pornography.

*Id.*⁷ In short, the court said, “[w]e are troubled by the absence of evidence of harm presented both before Congress and before us that the viewing of signal bleed of sexually explicit programming causes harm to children and that the avoidance of this harm can be recognized as a compelling State interest.” J.S. App. 30a, 30 F. Supp.2d at 716.

The three-judge court nevertheless ruled that the government had met its burden of showing a compelling interest in shielding minors from signal bleed. It did so based largely on isolated statements by this Court regarding minors’ exposure to “sexually explicit” or “indecent” speech. Thus, it said, only “some evidence of harm short of definitive scientific proof must be presented,” a burden it later characterized as “some minimal amount of evidence.” Even though this case demonstrated “a paucity of such evidence,” the court said, “we are not prepared to say that there is no prospect of such harm.” J.S. App. 29a-30a, 30 F. Supp. 2d at 716. Therefore, it reasoned, the government had met its burden – because it accepted the hypothetical possibility of harm, in the absence of actual evidence.⁸ It

⁷ Because the district court did not find evidence of “harmful potential” even from “explicit pornography,” this last statement presumably referred to Dr. Benedek’s views.

⁸ The court also found compelling the government’s interests in protecting “parents’ authority to raise their children as they see fit” and
(continued...)

went on, however, to hold §505 unconstitutional on the ground that an alternative means of shielding minors, less restrictive of First Amendment rights than §505, was available. J.S. App. 32a-39a, 30 F. Supp.2d at 717-20. This appeal by the government followed.

SUMMARY OF ARGUMENT

Under the First Amendment strict scrutiny applicable to §505, the government has the burden of showing that the law is necessary to achieve a compelling state interest. The district court’s determination that the government met this burden was unjustified because it was based on dubious and inadequate evidence, as the court frankly acknowledged. In the event, therefore, that this Court disagrees with the district court’s less-restrictive-alternative analysis, it should affirm the judgment of unconstitutionality on the ground that no compelling governmental interest was shown in shielding minors from “sexually explicit” or “indecent” signal bleed.⁹

To reach its compelling interest determination, the

⁸(...continued)

“the right of the individual to be left alone in the privacy of his or her home.” J.S. App.30a-31a, 30 F.Supp.2d at 716-17. Although *amici* do not address these rulings, we question whether the admittedly important rights to privacy and parental autonomy imply a governmental power to advance them by means of censorship laws.

⁹ Even if this Court were to apply a less stringent standard of First Amendment scrutiny, the government’s proof was insufficient to establish harm to minors from signal bleed.

district court bolstered the "paucity" of record evidence by citing four Supreme Court decisions involving minors' access to sexual speech. J.S. App. 27a-28a, 30 F. Supp. 2d at 715-16. But none of these cases applied the strict scrutiny/compelling interest test, or even contemplated the claim that fleeting sounds or images from indecent signal bleed could be harmful to youth. Particularly in light of this Court's recognition in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), that the term "indecent" (or its FCC definition, "patently offensive") has no readily discernible meaning, and can include non-prurient expression with serious literary or educational value, it cannot simply be assumed that minors are harmed by exposure to the sounds or garbled images of signal bleed.

The district court evidently recognized the need for expert evidence on the question of harm; but having invited such evidence, it then made a mockery of the strict scrutiny test. As the court acknowledged, the government presented not just a "paucity" of evidence but *no* evidence that signal bleed causes psychological harm. The government's failure of proof was not surprising, for most scholars in the field of sexuality agree that there is no basis to believe sexually explicit words or images, especially of the sort contained in signal bleed, in and of themselves cause psychological harm to the great majority of young people. Indeed, the district court ignored unusually strong evidence of the complete absence of empirical support for the government's claims.

Given the absence of evidence of harm from signal bleed, courts should not rely upon social conventions or moral value judgments in deciding whether the compelling

state interest test has been met. Our society embraces many differing, and hotly contested, moral and pedagogical attitudes toward minors and sexual speech. In the face of these many different attitudes and philosophies, the First Amendment does not permit Congress or the courts to impose one moral viewpoint about child-rearing, adolescence, and sexual ideas.

ARGUMENT

I THERE IS NO CONSTITUTIONAL BASIS FOR A PRESUMPTION THAT MINORS ARE HARMED BY SIGNAL BLEED FROM "SEXUALLY EXPLICIT ADULT PROGRAMMING OR OTHER PROGRAMMING THAT IS INDECENT"

The district court was correct to ask for evidence on the question of harm to minors from "sexually explicit" or "otherwise indecent" signal bleed. Having sought and heard such evidence, however, it was not free to ignore it by reducing the government's burden of proof to a nullity, or to rely on statements by justices of this Court in other contexts to conclude that the government could meet its burden of proof under the compelling state interest test merely by alleging, not proving, hypothetical harm. Should this Court disagree with the district court's "less restrictive alternative" analysis, therefore, it should still affirm the judgment of unconstitutionality because the government did not establish a compelling need to shield minors from signal bleed.

The district court relied upon statements in four Supreme Court cases for the proposition that minors are harmed by “exposure to patently offensive sex-related material,” and its consequent conclusion that only “some minimal amount of evidence” is needed to establish a compelling interest in protecting minors from signal bleed. J.S. App. 30a, 30 F. Supp.2d at 715-16, quoting *Denver Area*, 518 U.S. at 743.¹⁰ None of the cited cases, however, dealt with the compelling state interest test, where the government bears a heavy burden of justification and precision is required in the scope and wording of a censorship law. The situation here is not, therefore, comparable to *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986), where a public school administration, in the interests of pedagogy, disciplined a student for speech thought to be inappropriate at a school assembly. There is at bottom no constitutional justification for presuming psychological harm to minors from “sexually explicit” or “indecent” speech, no less from signal bleed. When the presumption of harm to minors serves to infringe the First Amendment rights of adults, as it does here, the constitutional issues become even more compelling. Cf. *Reno v. ACLU*, 521 U.S. 844.

Obscenity law in both England and the United States was initially premised on the notion that the most vulnerable or impressionable members of society – primarily minors –

¹⁰ The four cases were *Denver Area*, *supra*; *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); and *Ginsberg v. New York*, 390 U.S. 629 (1968). The court also cited *Prince v. Massachusetts*, 321 U.S. 158 (1944), not a case involving free speech or “indecentcy.”

must be shielded from material that might “deprave or corrupt” them. *Regina v. Hicklin*, L.R., 3 Q.B. 360 (1868); *Rosen v. United States*, 161 U.S. 30 (1896); *United States v. Bennett*, 24 F. Cas. 1093 (Circ. Ct. S.D.N.Y. 1879). The U.S. Court of Appeals for the Second Circuit rejected this overly censorious standard in the 1930s, see *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930); *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934); and this Court followed suit in 1957 with its decisions in *Butler v. Michigan*, 352 U.S. 380, and *Roth v. United States*, 354 U.S. 476, rejecting vulnerable youth as the benchmark for corruptibility, and ruling that the First Amendment does not permit government to reduce the adult population to reading or viewing “only what is fit for children.” *Butler*, 352 U.S. at 383. In order to shield minors, however, this Court eleven years later established the “variable obscenity” test in *Ginsberg v. New York*, 390 U.S. 629 (1968).

Ginsberg upheld a statute that prohibited the sale to persons under age 17 of material that lacked any redeeming value for minors, appealed to their prurient interest, and described sexuality in terms deemed patently offensive for that age group. The statute thus incorporated a variation on this Court’s three-part definition of obscenity – expression that is not protected by the First Amendment. Because the material at issue in *Ginsberg* was constitutionally unprotected as to minors, and the statute did not infringe the rights of adults, no First Amendment problem was involved, and the strict scrutiny standard accordingly did not apply. Instead, the Court had only to find it was “not irrational” for the New York legislature to believe the speech in question – so-called “girlie magazines” – might impair “the

ethical and moral development of our youth.” 390 U.S. at 639-41.¹¹ It was in this “rational basis” context *only* that *Ginsberg* noted the government’s interest in shielding minors from speech that is “not obscene by adult standards.” *Sable Communications*, 492 U.S. at 126.

Ginsberg thus did not involve any issue of compelling governmental interest, or suggest that a generalized, empirically unsupported legislative pronouncement regarding “the ethical and moral development of our youth” would suffice to justify the suppression or burdensome regulation of constitutionally protected speech. Equally important, the speech involved in *Ginsberg*, because it was obscene for minors by definition, did not have any redeeming value for them.¹² Where Congress chooses a standard of “indecent” or “sexual explicitness,” by contrast, much more careful analysis of the harm-to-minors question is necessary because the speech at issue *is* constitutionally protected and

¹¹ The court noted that it was “very doubtful that this finding expresses an accepted scientific fact.” *Id.*

¹² The obscenity definition at the time of *Ginsberg* incorporated the “utterly without redeeming social value” test derived from *Roth v. U.S.*, *supra*, and *Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413 (1966). Five years after *Ginsberg*, the test changed to one of “serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). Courts since *Miller* in “variable obscenity” or “harm-to-minors” cases have assumed that the looser *Miller* standard would now govern. *American Booksellers Ass’n v. Webb*, 919 F.2d 1493, 1496, 1503 & n.18 (11th Cir. 1990); *American Booksellers Ass’n v. Virginia*, 882 F.2d 125, 127 n.2 (4th Cir. 1989).

may have serious value.¹³

A departure from this important rule distinguishing “variable obscenity” from constitutionally protected speech was suggested, perhaps inadvertently, 21 years after *Ginsberg* in *Sable Communications*. *Sable* invalidated a law restricting “indecent” telephone messages, but in the process noted that government does have a “compelling interest” in shielding minors “from the influence of literature that is not obscene by adult standards.” 492 U.S. at 126, citing *Ginsberg* and *New York v. Ferber*, 458 U.S. 747 (1982).¹⁴ A casual reference later in the *Sable* opinion, without explanation, seemed to equate the *Ginsberg* variable obscenity concept with the much broader standard of constitutionally protected, potentially valuable and non-prurient indecency. 492 U.S. at 130.

Sable’s dicta was repeated in this Court’s plurality opinion in *Denver*; but again, without consideration of the vast difference between indecent speech, and material that is obscene for minors because it lacks serious value for them; or between the government’s minimal burden in a rational

¹³ There was no such analysis in *FCC v. Pacifica*, nor did the Court there articulate any constitutional standard of review. Instead, the 5-4 majority seemed to assume a deferential standard based on the FCC’s historic regulation of broadcast content. The Court has noted that *Pacifica* is a narrow holding, essentially limited to its facts. *Sable Communications*, 492 U.S. at 128.

¹⁴ *Ferber* involved an entirely different issue – not minors’ access to sexual images or ideas, but the physical exploitation of minors in sexual acts.

basis case and its immensely heavier one in a case involving constitutionally protected expression. That consideration did finally occur two years ago in *Reno v. ACLU*. Although repeating language from *Denver* and *Sable* concerning government's "generally ... compelling interest in protecting minors from 'indecent' and 'patently offensive' speech," 521 U.S. at 863 n.30, the *Reno* decision devoted substantially more attention to the vagueness and overbreadth of the indecency standard, and the many contexts in which it would suppress speech that was not only unharmed but positively helpful to youth: safer sex information, discussions of birth control, homosexuality, or prison rape, "artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library." *Id.* at 878.

Although "sexually explicit" or "indecent" cable programming may not have the range of the Internet speech at issue in *Reno*, the constitutional analysis is the same. For Congress in §505 deliberately selected the same broad, vague standard when it targeted "sexually explicit" or "indecent" programming, a standard that by definition includes non-prurient, constitutionally protected expression with serious value.¹⁵ At the very least, then, the courts must focus on the actual harm, if any, shown to be caused by the range of speech that Congress actually chose to suppress.

¹⁵ Programs with likely artistic or educational value on the Playboy channel have included safer sex instructions, a documentary produced for World AIDS Day, two magazine-style news programs, and the films *9½ Weeks* and *The Unbearable Lightness of Being*. See Pl. Motion to Affirm at 8; Def. Post-Trial Br. at 67-69.

II THE GOVERNMENT FAILED TO SHOW A COMPELLING NEED TO BAR MINORS FROM EXPOSURE TO SIGNAL BLEED

The government manifestly failed to meet its burden of demonstrating a compelling need to shield minors from signal bleed. As the district court acknowledged, there was *no evidence* of harm from signal bleed presented either to Congress or the court. By allowing the government to prevail on this issue in the absence of evidence simply because "we are not prepared to say that there is no prospect" of psychological harm, the district court turned the strict scrutiny standard upside down – it essentially created a presumption of harm in the absence of evidence, and imposed on the plaintiff the near-impossible burden of proving a negative.

As all three experts in this case agreed, there is no empirical evidence that exposure of minors to sexually explicit speech is in itself psychologically harmful. Not only is there a dearth of statistical data, but even clinical and anecdotal reports are limited. Dr. Benedek's opinions about "dysphoria" were both empirically and clinically unsupported, and in any event she acknowledged that such hypothesized effects would be transient, far from universal, and unpredictable for any particular child. The testimony of Dr. Green and Dr. Simon, by contrast – both, unlike Dr. Benedek, experts who have written extensively on pornography, sexuality, and media effects – was consistent with the widely agreed-upon view within the profession that

no harmful effects have been demonstrated.¹⁶ As the Surgeon General's Workshop on Pornography and Public Health noted in 1986, many psychologists believe young children are unaffected by pornography because they lack "the cognitive or emotional capacities needed to comprehend it." Edward Mulvey & Jeffrey Haugaard, *Surgeon General's Workshop on Pornography and Public Health* 61 (U.S. Dep't of Health & Human Services, June 22-24, 1986).¹⁷

Dr. Benedek's speculations regarding behavioral "modeling" effects were likewise unpersuasive. As the district court noted, they were based upon an analogy to media violence studies with which she had only superficial familiarity and which, in any event, are not applicable to sexual speech or signal bleed. The weight of psychological evidence, in fact, indicates that sexual offending is related not to youthful exposure to sexually explicit material but to its opposite: youthful repression, conflict, and guilt. See Judith Becker & Robert M. Stein, "Is Sexual Erotica Associated with Sexual Deviance in Adolescent Males?" 14

¹⁶ Indeed, Dr. Benedek's testimony relied upon analogies and suppositions substantially more attenuated than those rejected by courts in garden variety tort cases. See, e.g., *General Electric Co. v. Joiner*, 522 U.S. -, 118 S.Ct. 512 (1997); *Daubert v. Merrell Dow, Inc.*, 509 U.S. 579 (1993).

¹⁷ Even as to the effects of pornography on young adults, leading researchers have criticized the misuse of their data by those desiring to suppress sexually explicit speech. See Daniel Linz, Steven Penrod, and Edward Donnerstein, "The Attorney General's Commission on Pornography: The Gaps Between 'Findings' and Facts," 4 *American Bar Fdn. Research J.* 713 (1987).

Int'l J. Law & Psychiatry 85 (1991); Milton Diamond & Ayako Uchiyama, "Pornography, Rape, and Sex Crimes in Japan," 22 *Int'l J. Law and Psychiatry* 1, 15-19 (1999) (citing additional sources); P.H. Gebhard *et al.*, *Sex Offenders* (New York: Harper & Row, 1965); William Thompson, *Soft Core: Moral Crusades Against Pornography in Britain and America* 133 (London: Cassell, 1994) (collecting sources); Ira L. Reiss & Harriet M. Reiss, *Solving America's Sexual Crisis*, chs. 3 & 6 (Amherst, NY: Prometheus Books, 1997). As these studies suggest, punitive upbringing, repressed sexuality, and individual histories of physical and sexual abuse tend to be the primary determinants of sex offending.¹⁸

¹⁸ There are virtually no empirical studies of possible behavioral effects on minors from sexually explicit material – and certainly none on signal bleed. A variety of studies have attempted to gauge the effects of media offerings that address sexuality or sex roles in less explicit terms, but even here, it has not been possible to establish a causative connection to youngsters' sexual behavior. For example, an experiment in 1980 asked 75 adolescent girls, half of them pregnant, about their television viewing habits. The pregnant ones, overall, watched more TV soap operas and were somewhat less likely to think that their favorite soap opera characters would use contraceptives, but, as the authors acknowledged, it is "difficult to know if television portrayals are encouraging adolescents to be unrealistic about sexual relationships [that is, not using contraceptives], or if unrealistic adolescents identify with the glamorized TV portrayals." See Charles Corder-Bolz, "Television and Adolescents' Sexual Behavior," 3 *Sex Education Coalition News* 3, 5 (Jan. 1981); see also Victor Strasburger, *Adolescents and the Media - Medical and Psychological Impact* (Thousand Oaks: Sage Pubs., 1995); Jane D. Brown and Susan F. Newcomer, "Television Viewing and Adolescents' Sexual Behavior," 21(12) *Journal of Homosexuality* 77 (1991); American Academy of Pediatrics, "Children," (continued...)

The district court also noted Dr. Benedek's concern that "viewing sexually explicit programming might affect a child's attitudes toward sex" – an argument heavily relied upon by the government. J.S. App. 15a, 30 F. Supp. at 710, citing Def. Post-Trial R. Br. at 5. But here, both the government and its witness merged psychological issues with moral and ideological ones. As the government explained, the "harm" posited here is to "socially appropriate standards," and to "the promotion of 'healthy relationships ... where there is mutual caring, understanding, empathy, concern, civility, lack of callousness.'" Def. Post-Trial Br. at 29, citing Tr. at 461-62. These are indeed worthy goals, and society undoubtedly has a legitimate interest in teaching minors healthy sexual attitudes, but that interest should not be confused with evaluations of psychological harm. Nor is there evidence that sexual attitudes will be improved by blocking signal bleed.

Efforts to use science to "validate a social preference" can distort both science and public policy. Stephen Jay Gould, *The Mismeasure of Man* 22-23 (New York: W.W. Norton, 1981). As Gould observes, the risk of distortion is greatest when "topics are invested with enormous social importance but blessed with very little reliable information." *Id.* at 22. Attitudes about mental health have been particularly vulnerable to the influence of social convention. For example, in the 1940s and '50s,

medical experts cautioned against thwarting what a

¹⁸(...continued)

Adolescents, and Television," 96(4) *Pediatrics* 786 (Oct. 1995).

group of male doctors told *Life* magazine was a healthy woman's "primitive biological urge toward reproduction, homemaking and nurturing. ..."

Like those who argued against educating the Negro lest it confuse him as to his proper place – fomenting restlessness and menacing the social order – the critics of women's education couched their warnings in benevolent terms. "To urge upon her a profession in the man's world can adversely affect a girl," wrote a Yale psychologist, advising against the admission of women to the college. "She wants to be free of guilt and conflict about being a fulfilled woman."

Miriam Horn, *Rebels in White Gloves – Coming of Age with Hillary's Class - Wellesley '69* 7-8 (New York: Random House, 1999).

In sum, the factual record in this case was wholly insufficient to establish harm to minors, and the district court improperly relied upon speculation and social convention in its place. As the Second Circuit ruled in an analogous case involving allegations of harm from minors' exposure to "heinous crime" trading cards, "the conclusory and contradictory testimony of [the government's] experts" was legally insufficient; a law restricting speech cannot properly be based on "speculation or surmise." *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997). The Second Circuit observed that this Court has required "substantial supporting evidence in order for a regulation that threatens speech to be upheld":

"When the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply posit the existence of the disease to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

Id., quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994).¹⁹

III IN THE ABSENCE OF EVIDENCE OF PSYCHOLOGICAL HARM, SOCIAL TABOOS AND MORAL VALUE JUDGMENTS THAT ARE HIGHLY CONTESTED IN OUR DIVERSE SOCIETY CANNOT JUSTIFY CENSORSHIP

In the absence of any demonstration of psychological harm, the district court fell back on suggestions in *Denver, Pacifica, Bethel*, and *Ginsberg* that moral or social conventions are sufficient justification for laws restricting access to sexually explicit or indecent speech. Likewise, the government, essentially acknowledging that its expert's hypothesized harm was inadequate, argues that no evidence is necessary; "commonly held moral views about the upbringing of children" should suffice to establish a

¹⁹ The comments of the Court regarding legislative fact-finding in *Turner Broadcasting System v. FCC* ("*Turner II*"), 520 U.S. 180 (1997), are inapplicable here because, as the lower court observed, Congress held no hearings and made no findings of fact about the issue of harm to minors from exposure to signal bleed.

compelling interest in blocking minors' possible viewing of signal bleed. Br. of Appellants at 35 n. 21. The *amici curiae* Family Research Council *et al.* make the point in equally viewpoint-discriminatory terms: government has a compelling interest, they say, in suppressing minors' access to speech that "glorifies the 'free-sex' lifestyle," and in teaching youngsters that sexually explicit material is taboo. Br. of Family Research Council *et al.* at 9, quoting U.S. Dep't of Justice, *Attorney General's Commission on Pornography, Final Report* 339, 343-44 (July 1986).

This Court has long condemned such explicitly viewpoint-discriminatory justifications for censoring speech. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992); *Kingsley Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 689 (1959); see also *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir.), *aff'd mem.*, 475 U.S. 1001 (1985). Moreover, the government does not specify how it arrived at its conclusion about "commonly held moral views" in the first place. If anything, the record in this case suggests that, at least with respect to signal bleed, the great majority of parents do not view it as a major problem. The government's dismissal of such parents as merely inert, indifferent, or distracted, Br. at 33, has no factual basis. It seems not to have occurred to the government that many parents, while not favoring a diet of erotica for their youngsters or actively foisting it upon them, nevertheless do not believe serious psychological damage will result if they come upon it by accident. Indeed, they may feel that more harm would result from a highly negative adult reaction.

The government's generalized concerns with moral values and social taboos may have sufficed in *Ginsberg* to satisfy the rational basis test, or in *Bethel* in the particular pedagogical context of a public school assembly; but they are not sufficient to establish a compelling or even substantial government interest in the censorship of fleeting sounds or images of constitutionally protected speech about sex that may be non-prurient and have substantial value. In a society that embraces a wide range of views and attitudes about sexuality, and in which explicit details of the sexual activities of the President of the United States are the subject of impeachment proceedings in the Senate, the courts are hardly in a position to stake out one moral viewpoint that suppresses anything deemed indecent or sexually explicit in the interest of delivering a message of disapproval to minors. In the absence of actual evidence of psychological harm, it is for parents, schools, churches, and other community institutions to inculcate standards of civility and sexual behavior in our youth through education and example, rather than censorship and taboo.

CONCLUSION

The judgment should be affirmed on the ground that the government did not establish that §505 serves a compelling state interest.

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APPENDIX

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Vern L. Bullough, R.N., Ph.D., a nurse and historian, has specialized in the social and cultural influences of society upon sexual behavior, gender roles, family, and children. He is a Distinguished Professor Emeritus of History and Sociology from the State University of New York and was given the title of Outstanding Professor by the California State University system when he taught on the Northridge

campus. Currently he is a Visiting Professor in the Department of Nursing at the University of Southern California. He also spent over ten years of his academic career as a dean in the SUNY system. He has published extensively, writing or co-writing or editing, more than 50 books, has contributed chapters to nearly 100 others, and has published nearly 200 refereed articles as well as a far greater number of non-refereed ones. His books and articles have been translated into Chinese, Japanese, Korean, Italian, German, Russian, and Spanish. He has been invited to give papers or make presentations in England, Wales, Belgium, Germany, The Netherlands, Spain, the Soviet Union, Cyprus, India, China, Egypt, Mexico, and Canada. He has also lectured in most of the states in the United States. He is a past president of the Society for the Scientific Study of Sexuality, a fellow in many professional groups, and has received numerous awards from a variety of professional and community groups.

Ulrich Clement, Ph.D., is University Professor of Medical Psychology at the University of Heidelberg Medical School. He has held academic positions both as a research scientist and a clinical psychologist. He belongs to numerous international professional associations concerned with sex research and is president-elect of the International Academy of Sex Research. He serves on the editorial boards of seven scholarly journals, including the *Archives of Sexual Behavior* and the *Journal of Psychology and Human Sexuality*.

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programs on human sexuality which have been aired in Hawai'i and nationally, and was awarded the Citation for Creative Programming Excellence by the National University Extension Association (Arts and Humanities Division). He has been a consultant on sex education for the Hawai'i Department of Education, and on AIDS education and prevention for the Dutch Ministry of Health, Welfare and Culture, the Swedish national AIDS association, the Japanese Ministry of Health, and the Asian Federation for Sexology. Under the auspices of the National Science Foundation, between 1994-1996 he conducted a series of workshops on teaching about human sexuality. He has lectured by invitation around the United States and the world, including Canada, Israel, Japan, Sweden, Germany, and Hong Kong. Recently he was honored as the National Kidney Foundation Lecturer for the American Academy of Pediatrics (Urology Section) and as Lady Davis Visiting Scholar at the Hebrew University of Jerusalem. He has received many other awards and citations for his research and has served in a leadership capacity in numerous professional organizations.

Harold I. Lief, M.D., is Board Certified in Psychiatry and Neurology. He was a Professor of Psychiatry and Neurology at Tulane University School of Medicine and a Professor of Psychiatry at the University of Pennsylvania Medical School, where he remains Emeritus Professor, and was on the staff of the Hospital of the University of Pennsylvania and the Pennsylvania Hospital. He has served as President of the American Academy of Psychoanalysis and the Sex Information and Education Council of the U.S.; as Vice President of the World Association of Sexology; on the

Boards of the American Association of Sex Educators, Counselors and Therapists, the American College of Psychoanalysts, and the Center for Religion and Sexuality; and on the Council of the American Psychosomatic Society and the American Association for Social Psychiatry. He is a Life Fellow of the American Psychiatric Association, a Founding Fellow of the American College of Psychiatrists, and a Fellow of the American Association for the Advancement of Science. He has been a consultant to the World Health Organization, the National Institutes of Mental Health, the Masters and Johnson Institute, and the Philadelphia School Board Task Force on Sexuality, and has served on the editorial boards of dozens of professional journals. He has received many awards and honors, including the Award for Outstanding Contributions to the Field of Human Sexuality from the Society for the Scientific Study of Sexuality, two Annual Awards from the American Association of Sex Educators, Counselors and Therapists, and the Lifetime Achievement Award of the Philadelphia Psychiatric Society, as well as recognition in *Who's Who in America* and *Who's Who in the World*.

Konstance A. McCaffree, Ph.D., is a Certified Sexuality Educator. She holds a doctorate from New York University in Health Education, specializing in Human Sexuality, and is on the faculty of the University of Pennsylvania Graduate School of Education. She is frequently consulted by schools and organizations, in this country and around the world, for assistance in developing sex education materials, and has assisted in the development of programs and methods in Africa and the Philippines, and in Tennessee, New York, Pennsylvania, Connecticut and the District of Columbia.

She has written and published widely in the professional and lay literature on sex education, and has developed numerous curricula, for example: on sex education for adolescents, training trainers on human sexuality, training health professionals about sexuality, and training high school and middle school teachers. She has given many lectures and presentations at professional meetings and conducted many workshops for family life educators and others. She is on the Editorial Board of the *Journal of Sex Education and Therapy*, among other publications, serves on the Certification Committee of the American Association of Sex Educators, Counselors, and Therapists, and is on the Board of Directors of the Foundation for the Scientific Study of Sexuality, the Society for the Scientific Study of Sexuality, and the Sexuality Information and Education Council of the United States.

John Money, Ph.D., is Professor Emeritus of Medical Psychology in the Department of Psychiatry and Behavioral Sciences and Professor Emeritus of Pediatrics at the Johns Hopkins Hospital and School of Medicine. He has a worldwide reputation as an expert in gender science, research, and clinical care, and has become known for his work in psychoendocrinology and the science of developmental sexology. At Johns Hopkins, he founded the Psychohormonal Research Unit, the Gender Identity Clinic, and the Program for the Treatment of Sex Offenders; he developed the first curriculum in sexual medicine for Johns Hopkins medical students and a course on Biosocial Aspects of Human Sexuality in the School of Continuing Education. An indexed bibliography, entitled *John Money: A Tribute*, published in 1991, includes references to 34 books, 346

scientific papers, and 87 scholarly reviews and book chapters. He has received many honors and awards, including an Award for Outstanding Research Accomplishments from the National Institute for Child Health and Human Development, an Award for Lifetime of Scientific Contributions from the International Community of Professionals Devoted to the Treatment of Sex Offenders, and the Gold Medal Award for Lifetime Achievement from the World Association of Sexology. He has served on more than 40 editorial boards, and on many scientific advisory boards and committees. He was President of the Society for the Scientific Study of Sexuality (1974-76) and is a Fellow of the American Association for the Advancement of Science and a charter member of the International Academy of Sex Research.

Charlene L. Muehlenhard, Ph.D., is Professor of Psychology and Women's Studies at the University of Kansas. She earned her doctorate in Psychology at the University of Wisconsin and is a Fellow of the American Psychological Association. She has published more than 25 articles in refereed journals, contributed to numerous professional books, written for the lay press, and delivered approximately 150 presentations at professional meetings. She was President of the Society for the Scientific Study of Sexuality (1996-97) and served on its Executive Committee and Board of Directors, and on the Editorial Boards of *The Journal of Sex Research*, *Sex Roles*, *Family Violence and Sexual Assault Bulletin*, *Psychology of Women Quarterly*, and *Family Relations*. She is also on the Board of Directors of the Douglas County Rape Victim/Survivor Service, which

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IN THE
**Supreme Court of the United
States**

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, et al.,
Appellants,

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellee.

On Appeal from the United States District Court
for the District of Delaware

**AMICUS CURIAE BRIEF FOR
NATIONAL CABLE TELEVISION ASSOCIATION
IN SUPPORT OF APPELLEE**

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INTEREST OF AMICUS

The National Cable Television Association ("NCTA") is the principal trade association representing the cable television industry in the United States. NCTA's members include cable operators that serve more than 90% of the nation's cable subscribers, as well as most of the non-broadcast program networks whose services are carried on cable systems. NCTA also represents a large number of suppliers of equipment to cable operators and program networks.

This case has important implications for the cable industry, especially insofar as the Government contends that restrictions on the carriage of "indecent" programming on cable television are subject to a more relaxed standard of review than the strict scrutiny that generally applies to content-based regulation of speech. The cable industry, like the three-judge district court, acknowledges this Court's determination that the unwanted intrusion of sexually explicit programming into homes in a manner that is likely to be viewed by children may, in some circumstances, warrant regulation. Even before Congress adopted the provisions of the Communications Decency Act of 1996 that are at issue in this case, the cable industry adopted voluntary guidelines designed to prevent any such undesired intrusions.

But the Court has never held that the Government may regulate indecent but non-obscene programming on cable television without meeting the tests of strict scrutiny. The Court has not heretofore given the Government leeway to regulate such content without requiring the Government to demonstrate both that the regulation advances a compelling interest and that it is narrowly tailored to be no more restrictive of protected speech than is necessary to serve that interest. The cable industry has an important interest in opposing the Government's notion that cable operators and program networks are subject to a lesser standard of First Amendment protection, at least with respect to indecent programming, than other speakers and media of communication.*

SUMMARY OF ARGUMENT

Differences among media may, indeed, justify differential regulation of indecent content on those media. One such difference is the use by broadcasters of scarce spectrum, which has been held by this Court to justify the regulation of broadcast content to a degree not permitted of any other media. The Court has squarely held that this unique rationale for regulation does not apply to cable television.

* The parties have consented to the filing of this brief.

As the Court's decisions regarding the regulation of indecent material over broadcast television, telephone wires and the Internet demonstrate, the differences that count, aside from spectrum scarcity, are those differences that affect whether a regulation is necessary to protect the Government's compelling interest in protecting children from the unwanted and unexpected intrusion of such material into homes. Unlike broadcasters, cable operators can limit accessibility to any channel of programming that they offer.

If a household chooses not to purchase cable service, it will receive no cable programming. If it chooses not to purchase an optional package of cable services, or an optional channel or pay-per-view offering, the operator will scramble or block reception of that programming. If parents want to block their children's access to one or more channels included in the packages that they have purchased, operators will make available devices to do just that. And if, despite the operator's scrambling of unpurchased channels, a parent is concerned that the audio or video portions of those channels is partially viewable or audible, operators can fix that, too, by providing that parent with a device that fully blocks the signal.

All these capabilities make it possible to protect parents from the unexpected and unwanted exposure of their children to sexually-oriented programming and other programming that they may find unsuitable and inappropriate. And if they can provide such protection in a manner that is less restrictive than a statute or regulation that prohibits or restricts the provision of particular content, then the First Amendment requires that such a less restrictive means be chosen.

As the three-judge district court held, Section 505 of the Communications Decency Act of 1996 – which requires that cable operators either fully block channels primarily dedicated to sexually-oriented programming or carry such programming only during late-night hours – are more restrictive than necessary to prevent the unwanted intrusion of partially scrambled sexually-oriented channels in households that have not purchased them. The court

correctly found that as long as subscribers are aware that sexually-oriented programming is being provided on the system and is only partially scrambled, and as long as they are aware of their right to obtain full blocking devices free of charge pursuant to Section 504, the provisions of Section 504 fully achieve the objectives of Section 505, and do so in a manner less restrictive than Section 505.

ARGUMENT

I. STRICT SCRUTINY APPLIES TO CONTENT-BASED REGULATION OF CABLE TELEVISION PROGRAMMING.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court held that it was constitutionally permissible for the FCC to prohibit *broadcasters* from transmitting certain material that was deemed offensive and inappropriate for children except during late evening hours. The Government now contends that *Pacifica* means that something short of the most exacting First Amendment scrutiny applies to the regulation of "indecent," non-obscene content on *cable television*. It argues that it is entitled to more "flexibility" and greater "deference" when it engages in such regulation than when it engages in other forms of content regulation. *See, e.g.*, Government Brief at 26.

To prevail in this case, the Government would certainly need such a relaxation of First Amendment standards. But there is no basis in *Pacifica*, in other decisions of this Court, or in the particular context of this case, for granting such extraordinary flexibility and deference. When the Government seeks to regulate the content of protected speech, this Court has generally insisted that it have a "compelling" or "extremely important" justification. *See, e.g.*, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374, 2385 (1996). This standard was not loosened in *Pacifica*. The Government's interest in that case – enabling parents to prevent the unexpected and unwanted intrusion into their

homes of, and exposure of their children to, indecent, sexually-oriented material – has repeatedly been recognized by this Court to be a compelling interest.

Even in cases involving content-neutral regulation, the Court requires that the restriction on protected speech be "no greater than is essential to the furtherance of" the Government's asserted interest (which, in the case of content-neutral regulation need not be as "compelling"), *United States v. O'Brien*, 391 U.S. 367, 377 (1968). But it applies a still more stringent test to content-based regulation. To show that a content-based regulation is sufficiently narrowly tailored, the Government must generally show that the regulation is the least speech-restrictive means of advancing its compelling interest. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 329 (1998). And it is entitled to less flexibility and deference than in seeking to justify a content-neutral restriction, which must not be "substantially broader than necessary to achieve the government's interest," but "need not be the least restrictive or least intrusive means" of serving that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989). *See also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 671 n.2 (1994) ("*Turner I*") (Stevens, J., concurring in part and concurring in the judgment) ("the factual findings accompanying economic measures that . . . have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech").

The more stringent "least restrictive means" test that applies to content-based regulation is no less applicable in cases where the important interest at stake involves protecting children from inadvertent exposure to sexually explicit programming than in cases involving other compelling interests. Thus, Justice Kennedy has pointed out (in a case specifically involving the regulation of sexually-oriented programming on cable television), that, in contrast to the "intermediate" level of scrutiny that the Court applied in *Turner I*,

[w]hen applying strict scrutiny, we will not assume plausible alternatives will fail to protect compelling interests; there must be some basis in the record, in legislative findings or otherwise, establishing the law as the least restrictive means. *Sable Communications, supra*, at 128-130. Cf. *Turner Broadcasting*, 512 U.S., at 664-668.

Denver Area Educational Telecommunications Consortium, supra, 116 S. Ct. at 2417 (Kennedy, J., concurring in part and dissenting in part).

Similarly, in *Sable Communications of California, Inc. v. FCC, supra*, the Court, in applying strict scrutiny to the FCC's regulations of indecent content provided over the telephone by so-called "dial-a-porn" services, refused to give any special deference to Congress's judgment that no less restrictive means of protecting minors from such content was available:

To the extent that the federal parties suggest that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."

492 U.S. at 129 (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).

Nor, in *Reno v. ACLU*, 512 U.S. 844, 117 S. Ct. 2329 (1997), did the Court relax the standards of strict scrutiny in reviewing the constitutionality of the provisions of the Communications Decency Act restricting indecent content on the Internet - provisions that, like Section 505, were aimed at

"protect[ing] children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech." 117 S. Ct. at 2342. To the contrary, the Court determined that "the most stringent" review was warranted. *Id.* at 2343.

As the Court indicated in *Pacifica*, some regulation of broadcast content that might not otherwise survive strict scrutiny has historically been permitted because of broadcasting's unique use of scarce spectrum. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969), the Court explained that if there was to be any broadcasting at all, "it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few." And since the Government was necessarily involved in selecting the few licensees, it could require a broadcaster "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community, and which would otherwise, by necessity, be barred from the airwaves." *Id.* at 389.

The Court, in upholding the FCC's regulation of indecency in *Pacifica*, relied on the fact that, "of all forms of communications, it is broadcasting that has received the most limited First Amendment protection." 438 U.S. at 748. But the principal reason for this limited protection - the essential allocation of scarce spectrum by the Government - does not apply to cable television: "[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation," *Turner I*, 512 U.S. at 637; and "application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation." *Id.* at 639. Thus, to the extent that *Pacifica* applied a "more relaxed standard of scrutiny" to broadcast indecency on *that* basis, no similar departure from strict scrutiny is warranted in reviewing the content-based regulation of cable programming at issue in this case.

The Court in *Pacifica* also pointed to several unique characteristics of broadcasting that justified the FCC's indecency regulations – in particular, the “uniquely pervasive presence” of the broadcast media, 438 U.S. at 748, and the fact that broadcasting is “uniquely accessible to children.” *Id.* at 749. But these unique characteristics were relevant precisely insofar as they made the regulations at issue in that case the least restrictive means of achieving the Government's interests. The pervasive availability of over-the-air broadcasting justified a prohibition on indecent speech prior to late evening hours because it meant that there was no less restrictive way for parents to prevent such speech from intruding by surprise into the privacy of their homes (or, in that case, their cars). Where a technology used by *other* media permits *other* means of preventing such intrusions, prohibitions on indecent speech have not survived First Amendment scrutiny.

For example, although telephones are certainly ubiquitous in the nation's households, and computers are rapidly becoming a household utility, the Court rejected restrictions on indecent commercial telephone and Internet communications precisely because, in contrast to the context of *Pacifica*, it was possible to craft less restrictive ways to prevent the unexpected exposure of children to such communications. In *Sable*, the Court noted, first, that

[p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.

492 U.S. at 128. The Court also found that “credit card, access code and scrambling rules” would be “a ‘feasible and effective’ way to serve the Government's compelling interest in protecting children.” *Id.*

And in *Reno*, the Court first noted that, as in the case of dial-a-porn – and unlike the broadcast material at issue in *Pacifica* – indecency on the Internet was relatively unlikely to catch viewers by surprise:

The District Court specifically found that “[c]ommunications over the Internet do not ‘invade’ an individual's home or appear on one's computer screen unbidden. Users seldom encounter content ‘by accident.’ ” 929 F. Supp., at 844 (finding 88). It also found that “[a]lmost all sexually explicit images are preceded by warnings as to the content,” and cited testimony that “‘odds are slim’ that a user would come across a sexually explicit sight by accident.” *Ibid.*

117 S. Ct. at 2343. Second, the Court agreed with the district court that “[d]espite its limitations, currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available.” (*quoting* district court) (emphasis added by this Court). In these circumstances, the Court held that the ban was unconstitutional, even though there was no way to protect every child in all circumstances from viewing indecent material on the Internet.

Wholly apart from the absence of any “spectrum scarcity” rationale for content-based regulation of cable, unique characteristics of cable television make it possible to prevent the unwanted and unexpected exposure of children to inappropriate material through means not available for broadcast transmissions. Most significantly, cable operators can, at a subscriber's request, block a particular channel from “intruding” into that subscriber's home. For this reason, it has long been established that the Government may not, on the basis of *Pacifica*, prohibit or restrict cable operators from providing sexually-oriented, non-obscene programming to subscribers who choose to purchase it. *See Cruz v. Ferre*,

755 F.2d 1415 (11th Cir. 1985); *Community Television, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

In the first instance, households can decide whether or not to subscribe to cable service at all – and a significant number still decide not to subscribe. While 97% of the nation's households have television sets and, therefore, have unrestricted access (whether wanted or unwanted) to all local broadcast programming, fewer than 70% subscribe to cable.¹

Second, while households that subscribe to cable are required by law to purchase the “basic” tier that includes the local broadcast channels carried on the system,² they may choose whether or not to purchase any other tiers or à la carte or pay-per-view channels. Cable program networks are more likely than broadcast stations to limit their service to a particular type or category of programming (e.g., news, sports, music videos, children's programming, adult-oriented programming, etc.), so subscribers can readily identify any channels likely to carry programming that they may find offensive. If they do not choose to purchase a service, the cable operator will use some method of blocking access to it. *See Cruz v. Ferre*, *supra*, 755 F.2d at 1420.

Third, if a household wants to purchase a tier of services but does not want to receive a particular channel on that tier, there are devices available to block reception of that channel, *see id.* – and cable operators are required by law to sell or lease such devices upon request by a subscriber. 47 U.S.C. § 544(d)(2).

Fourth, if a household has chosen *not* to purchase a particular tier or à la carte or pay-per-view channel but the cable operator's method of preventing access does not fully block the video or audio, there are devices available for fully blocking such channels – and cable operators are required by

¹ NCTA Cable Television Developments, Summer 1999, p. 1.

² *See* 47 U.S.C. § 543(b)(7).

law, in such circumstances, to provide such devices *at no charge*. 47 U.S.C. § 560 (also referred to as Section 504 of the Communications Decency Act of 1996).

Because of the availability of these blocking devices, cable programming is not as inherently pervasive as broadcast programming. And it is possible to prevent the unexpected intrusion of unwanted programming through means less restrictive than the time-channeling requirements that were imposed on broadcasters in *Pacifica*. In assessing whether a particular restriction of sexually-oriented content on cable is permissible under the First Amendment, the question is not whether such restrictions survive the more relaxed standard of scrutiny urged by the Government. It is whether, under the standards of strict scrutiny that the Court generally applies to non-obscene content, there is a less restrictive way to advance the Government's compelling interests. In this case, as the court below held, it is possible to prevent the intrusion of unwanted indecent programming through means substantially less restrictive than the requirements imposed by Section 505 of the Communications Decency Act of 1996, 47 U.S.C. § 561.

II. SECTION 505 IS NOT NARROWLY TAILORED TO ADVANCE A COMPELLING GOVERNMENT INTEREST.

Section 505 requires cable operators who carry channels primarily dedicated to sexually-oriented programming to fully scramble those channels so that neither the audio nor the video is receivable in a comprehensible manner by subscribers who choose not to purchase such services. Alternatively, operators may carry such channels only during hours when they are unlikely to be viewed by a significant number of children – which the FCC has determined to be the hours between 10 p.m. and 6 a.m.

No one disputes that this content-based regulation restricts protected speech. To the extent that full scrambling is not a readily available option for a significant number of cable operators, this content-based restriction clearly restricts the

protected speech of program networks primarily dedicated to sexually-oriented programming. And it restricts the protected speech of cable operators who would choose to provide such programming to subscribers before 10 p.m., but for whom system-wide implementation of full scrambling is not economically viable.

The court below held that any compelling interests of the Government that might be furthered by Section 505 can be advanced as well – and in a less restrictive manner – by the requirements of Section 504, provided that cable subscribers have adequate notice that sexually-oriented channels are being carried in partially scrambled form on their system and that blocking devices are available at no charge pursuant to Section 504:

[W]ith adequate notice of the issue of signal bleed, parents can decide for themselves whether it is a problem. Thus to any parent for whom signal bleed is a concern, § 504, along with “adequate notice,” is an effective solution. In reality, § 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights.

J.S. App. 37a-38a.

The Government, in addition to maintaining that the court applied too stringent a standard of review, contends that Section 504 is *less effective* than Section 505 and that, in any event, Section 504 is *no less restrictive* than Section 505. Neither argument holds water.

A. Section 504 Is Fully Effective in Advancing the Interests Advanced by Section 505.

The Government does not strenuously argue that Section 504 (with adequate notice) is less effective than Section 505 in achieving two of the interests asserted by the Government and identified as “compelling” by the court below – the

interests “in supporting parental claims of authority in their own household – the need to protect parents’ right to inculcate morals and beliefs [i]n their children” and “in ensuring the individual’s right to be left alone in the privacy of his or her home – the need to protect households from unwanted communications.”³ But the Government contends that Section 504 would not serve a third interest, namely “society’s independent interest in protecting minors from exposure to indecent, sexually explicit materials.”⁴

Thus, the Government maintains that “[t]here would certainly be parents – perhaps a large number of parents – who out of inertia, indifference, or distraction, simply would take no action to block signal bleed, *even if fully informed of the problem and even if offered a relatively easy solution.*” In its view, the Government has a compelling interest in protecting children from partially scrambled programming that “society” deems harmful and offensive, even where their fully informed parents see no need to take an easy step to block such programming from their homes. In addition, the Government is worried about “children who would view signal bleed at the homes of friends whose parents, due to the

³ Although the Government thinks it “highly unlikely that the district court was correct in its apparent belief that its enhanced version of Section 504 would be sufficient to inform all parents of the problem of signal bleed and to permit them to eliminate it easily and effectively,” the Government does not further argue the point. In any event, what matters is not whether the particular notice requirements proposed by the court would be sufficient to inform parents that sexually-oriented programming is being carried on the system, that the audio and/or video may not be fully scrambled, and that full blocking devices will be provided at no charge on request. What matters is that *some* form of notice surely *would* be reasonably sufficient to make subscribers aware of the problem and of the available remedy – and requiring the provision of such notice would be a much less restrictive way to enable parents to ensure that sexually-oriented programming and any other programming that they may find offensive and harmful to their children is fully blocked from intruding into their homes.

⁴ Government Brief at 38.

same factors, do not act under an enhanced Section 504 to block signal bleed.”⁵

Whether the Government’s paternalistic interest in substituting its judgment for the judgment of a child’s fully informed parents provides a legitimate and compelling basis for content-based regulation is dubious at best. See, e.g., *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. at 2416 (Kennedy, J., concurring in part and dissenting in part) (“So long as society gives proper respect to parental choices, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors.”) (emphasis added). Certainly, the scenarios suggested by the Government are a far cry from what was at issue in *Pacifica*, where parents who had a strong desire to prevent their children from being exposed to certain sexually-oriented content had no available way of blocking such content from the radio dials in their cars.

But the extent to which the Government has a compelling interest to protect children from speech to which their parents are indifferent need not be resolved in this case – because Section 505 itself does not appear to be aimed at, or at least cannot be justified by, that interest. Section 505 requires full scrambling, or time channeling, to ensure that children are not exposed to sexually-oriented channels, even in partially scrambled form, that their parents have not chosen to purchase. But Congress took no steps to prevent children from seeing or hearing such channels, wholly unscrambled, in households that have purchased them. If Congress, in enacting Section 505, had been concerned with protecting children from the informed judgments of their parents with respect to exposure to sexually-oriented channels – or from seeing or hearing such channels in the homes of friends whose parents have purchased the channels – it would have banned all such channels from daytime hours.

⁵ *Id.* at 33.

Put another way, the Government cannot claim that a statutory restriction on speech is narrowly tailored to serve a particular compelling interest if the statute, in other respects, seems unconcerned with that interest. As Justice Kennedy has noted, “[p]artial service of a compelling interest is not narrow tailoring.” *Denver Area Educational Telecommunications Consortium v. FCC*, *supra*, 116 S. Ct. at 2416 (Kennedy, J., concurring in part and dissenting in part) (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984); *The Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983)). The Government does not explain why full scrambling is necessary to serve a compelling interest in preventing children from seeing and hearing partially scrambled sexually-oriented programming that their parents have chosen not to buy, but no steps are necessary to prevent children from seeing and hearing fully unscrambled sexually-oriented programming that their parents or friends’ parents have chosen to purchase – unless the only compelling interest at stake is the parents’ interest in preventing the unwanted intrusion, via “signal bleed,” of sexually-oriented programming into their homes.

Section 504, as the Government essentially concedes, effectively solves that problem, so long as parents can be expected to be aware of the problem and the availability of a free remedy. It may be that Congress enacted Section 505 in addition to Section 504 because it was concerned that parents could *not* always be expected to be aware of the problem and the remedy available under Section 504. But to the extent that this was a legitimate concern, the court below correctly recognized that Congress could have effectively addressed it by adding reasonable notice requirements to the less restrictive provisions of Section 504.

B. Adequate Notice and Availability of Free Blocking Devices Provide a Content-Neutral, Less Restrictive Alternative to Section 505.

The Government also argues that Section 504, augmented by whatever requirements are necessary to ensure that households are aware of "signal bleed" and the availability of a free remedy, would not necessarily be a *less restrictive* alternative to Section 505. The Government contends that once subscribers are made aware of the problem, so many of them will ask for free blocking devices that cable operators will choose not to carry potentially offensive channels – just as most have chosen not to carry sexually-oriented channels during daytime hours rather than fully scramble such channels for all subscribers as would be required by Section 505.

Even if this were to occur, Section 504 with adequate notice requirements would still be less restrictive of First Amendment rights, insofar as Section 504 gives subscribers the right to obtain full blocking of any partially scrambled channels that *they* – not the Government – deem offensive or unsuitable for children. Unlike Section 505, it "gives proper respect to parental choices." See discussion at p. 14, *infra*.

In any event, the notion that requiring cable operators to take reasonable steps to ensure that subscribers are aware of the problem of – and available remedies for – signal bleed *might* have the same (or even greater) restrictive effects on the carriage of sexually-oriented channels as Section 505 is purely speculative. It is based on two unsupported and less than obvious assumptions – first, that "[a] significant increase in the number of subscribers seeking lockboxes would inescapably follow if a truly effective notice requirement were added to Section 504;"⁶ and, second, that "[i]f a genuinely effective system of notice and easily available blocking were instituted and proved to be as

⁶ Government Brief at 37.

effective as the district court evidently anticipated, the number of subscribers requesting blocking could be expected to exceed the minimal number necessary to render carriage of the sexually explicit channels uneconomical."⁷

There is no evidence anywhere in the legislative or judicial record, much less in the Government's brief, indicating how many cable subscribers, if fully informed, would ask for full blocking devices. The Government simply assumes that a large number of subscribers would surely ask for blocking devices if only they were fully informed of the "signal bleed" problem. But it is quite plausible that many responsible parents, when alerted to the problem of signal bleed, will feel confident of their own ability to supervise and determine what their children do and do not watch, without the need for a blocking device. This is especially likely in light of the commitment of cable operators, pursuant to a resolution adopted by NCTA's Board of Directors almost five years ago, to "use reasonable efforts to position primarily sexually-oriented premium channels on channels well away from program networks which carry specific program blocks targeted at children." NCTA Resolution on Sexually-Oriented (Adult) Programming Services, adopted Feb. 9, 1995.⁸

⁷ *Id.* at 38.

⁸ The resolution also committed operators voluntarily to provide full blocking of any partially scrambled signal at no charge, upon any customer's request, even before Section 504 turned such a voluntary commitment into a legal obligation. In addition, the resolution embodied a commitment to accompany all print and video promotion of sexually-oriented channels with an advisory that the programming is targeted to an adult audience and that parental control options are available. It also reflects the industry's established practice of informing franchising officials, and other appropriate community leaders, that a primarily sexually-oriented premium channel is being carried and of making such officials and leaders aware of the steps being taken to enable only those expressly wishing to view such programming to do so. All of these steps reduce the likelihood of unexpected exposure of children to sexually-oriented channels, even apart from the requirements of Section 504.

Moreover, the Government has no basis for assuming that, if the number of subscribers who request blocking devices were to increase significantly, cable operators would simply drop offensive channels rather than find a more economical way to distribute such devices. The Government points to testimony in the record, cited by the court below, purportedly indicating that the cost of distributing lockboxes or traps to 3-6% of a system's customers would equal all the revenue the operator derived from carrying sexually explicit channels Government Brief at 36. But that testimony was clearly based on the assumption that operators would have to incur the costs of *installing* each trap, in addition to the costs of the traps themselves.

Thus, the court noted that "[t]hese calculations are premised on a cost of \$37 per blocking mechanism plus installation." Appendix at 22a. But the cost of the trap alone is a small fraction of this amount – estimated by the Government's own witness as "about \$4 to \$10." Declaration of Charles Jackson, Plaintiff Ex. 257. The rest is attributable to the cost of sending a technician to the home to install the device.

Playboy argued below that "negative traps can be mailed to subscribers thereby obviating the need for installation costs and lowering the cost per mechanism to the cost of the product plus postage." *Id.* The court suggested that this would not be a viable alternative because "[a]ll experts agree that negative traps are installed on the cable pole or the cable itself outside the home, requiring installation." Most negative traps *are* installed by technicians outside subscribers' homes. But this is because most negative traps in use today are intended to prevent subscribers from receiving channels that they might like to watch but have not purchased. If the traps were installed in the home, subscribers could easily remove them and watch all the premium channels on their systems at no charge.

But this concern about signals being stolen in the home does not apply to subscribers who *ask* for a blocking device because they do *not* want particular channels to be viewable

in their homes. Cable operators need not be concerned that subscribers who request traps pursuant to Section 504 will remove the traps and watch channels that they have not purchased. Therefore, they could mail the devices to subscribers, or have subscribers pick them up at the cable system's offices. This would reduce the per-subscriber cost of complying with Section 504 to only about a small fraction of what the court below assumed – so that many more subscribers could request blocking before the costs exceeded the revenues from carrying a particular channel.

In sum, the district court has not, in this case, dreamed up a purely hypothetical more narrowly tailored alternative to Section 505. The court looked to Congress and found it had already enacted such an alternative in Section 504 (and could have adopted more formal notice requirement, which it itself applied). It found that as long as steps are taken to ensure that subscribers are informed that sexually-oriented channels are being carried on their systems and that full blocking is available on request pursuant to Section 504, any legitimate, compelling interests can effectively be advanced in a way that is less restrictive of protected speech.

That is the established test for reviewing content-based statutes such as Section 505, and the three-judge court correctly applied it. The Government asks for more "deference" and "flexibility" to regulate the content at issue in this case because it is unable to show that these findings or the application of the law are wrong. In fact, the court properly applied the standards of strict scrutiny to the circumstances of this case, and its decision should be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

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No. 98-1682

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellee.

On Appeal from the United States District Court
for the District of Delaware

**BRIEF OF THE MEDIA INSTITUTE,
AS AMICUS CURIAE IN SUPPORT OF
APPELLEE**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1999

No. 98-1682

UNITED STATES OF AMERICA, ET AL.,

Appellants,

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,

Appellee.

**On Appeal from the United States District Court
for the District of Delaware**

**BRIEF OF THE MEDIA INSTITUTE,
AS AMICUS CURIAE IN SUPPORT OF
APPELLEE**

STATEMENT OF INTEREST¹

The Media Institute (the “Institute”) is an independent, nonprofit research foundation in Washington, D.C., specializing in issues of communications policy. The Institute advocates and promotes three principles: First Amendment freedoms for both new and traditional media; the maintenance and development of a dynamic communications industry based on competition rather than regulation; and excellence in journalism. The Institute has participated in regulatory proceedings and in select cases before federal courts of appeal and this Court. The Institute also conducts

¹ Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support.

research projects and sponsors publications relating to the First Amendment and other issues of consequence to the communications media.

Amicus's interest in this case is based on our deep and abiding commitment to the values of free speech and free press that impels us to support full protection under the First Amendment for all print and electronic media. We believe that, in an age of technological convergence of the media, it is vital that inappropriate, unnecessary and out-of-date distinctions of constitutional significance no longer be drawn among the media. Rather, all media must enjoy equal protection from governmental content-based restrictions on freedom of expression, both to honor the majestic guarantee of the First Amendment and to enable the media to compete with one another on a level playing field in the twenty-first century.

To achieve these fundamental goals, *Amicus* believes it essential for the Court to strictly scrutinize all content-based restrictions on freedom of the press. In doing so, the Court, we submit, should hold the Government to an appropriately high burden of proof as to the compelling interests it asserts, the necessity and effectiveness of its regulatory measures, and the lack of a less speech-restrictive approach.

SUMMARY OF ARGUMENT

We are in a new era of technologically advanced electronic media that are rapidly becoming fully digital in format. This transformation of the electronic media allows easily available and highly effective user-based controls over virtually all content received in the home. There is, therefore, no persuasive reason for the Court to refrain from applying strict scrutiny to any content-based restrictions the Government seeks to impose on such media. Strict scrutiny is necessary to give continuing meaning to the fundamental precept that the First Amendment does not allow the Government to reduce the free-speech rights of adults to material fit only for children. See *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 759 (1996); *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 128 (1989); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73 (1983); *Butler v.*

Michigan, 352 U.S. 380, 383 (1957). Strict scrutiny for electronic media is equally necessary to foster full and equal competition among all media to serve the vital ends of informing, educating and entertaining the public.²

The Court might well resolve this case in appellee's favor on the narrow grounds adopted by the district court. See *Greater New Orleans Broad. Ass'n, Inc. v. United States*, ___ U.S. ___, ___, 119 S. Ct. 1923, 1930 (1999). Section 505 is impermissibly vague and very far from either the least speech-restrictive approach or even a narrowly tailored approach. But in affirming the judgment below, it is vital, we submit, for the Court to reaffirm the proposition that content-based restrictions on protected speech call for strict scrutiny. The Court must require the Government to demonstrate, not just assert, a truly compelling state interest that is addressed in what is plainly the least speech-restrictive manner.

The Court, in our view, should not follow the less protective and ambiguous approach of the plurality in *Denver Area* nor apply *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). *Pacifica's* sparse rationale does not withstand modern analysis. Moreover, *Pacifica* is badly out-of-date technologically and should no longer be followed. None of the factors here – the electronic media of (cable) television, the indecent or sexually oriented nature of the programming, or the need to protect the psychological well-being of children – provides any adequate justification for the Court to abandon strict scrutiny.

We recognize that the Government's asserted interest in protecting children is undoubtedly an important and compelling one. But the Court should go well beyond this generality and hold the Government to an appropriately high burden of proof of harm, proof of efficacy of its chosen remedial measures, and proof of no less speech restrictive alternatives. This is especially appropriate in the increasing number of cases such as this, involving politically

² As this Court noted in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997), the Telecommunications Act of 1996, of which Section 505 here at issue was a part, was "an unusually important legislative enactment" whose "primary purpose was to reduce regulation and encourage 'the rapid deployment of new telecommunications technologies.'"

volatile legislation restricting free speech in the name of children, where Congress acts essentially without deliberation, and, in this particular case, where the potential for harm from signal bleed is truly minimal. Without such strict scrutiny, the asserted interests of children will be simply an unwarranted trump upon the vital First Amendment rights of all.

ARGUMENT

I. THE COURT SHOULD APPLY STRICT SCRUTINY TO SECTION 505.

A. Section 505 Unquestionably Is Content-Based Regulation Of Protected Speech Demanding Strict Scrutiny.

Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, regulates "signal bleed," the partial, scrambled audio and video reception of sexually explicit adult cable television programming in the homes of non-subscribers to that programming. It applies to vaguely defined "sexually explicit adult programming or other programming that is indecent," but only to such programming on a cable channel that is "primarily dedicated to sexually-oriented programming." *Id.* Thus Section 505 apparently, and irrationally, applies to Playboy Television but not, for example, to Home Box Office (HBO) even though both channels may show some of the same programming, *see Playboy Entertainment Group, Inc. v. United States*, 30 F. Supp. 2d 702, 707 (D. Del. 1998), and even though some programming on HBO - its provocative and highly popular series "Real Sex," for example - may be as sexually explicit as anything on Playboy.³

Section 505 requires a cable operator to fully block both the audio and video portions of such a channel for all non-subscribers to that channel so that no "understandable" portion bleeds through. As such total blocking currently is impractical, the statute and implementing regulations of the Federal Communications Commission ("FCC") allow a cable operator, instead, to time channel the affected programming to "safe harbor hours" when a

significant number of children are not likely to view it. The effect of Section 505, therefore, is to limit Playboy Television to the "broadcasting Siberia," *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996), of late night hours (here between 10:00 p.m. and 6:00 a.m.). *See Playboy Entertainment*, 30 F. Supp. 2d at 711. Thus Section 505 severely restricts Playboy's entire signal - all its programming, even that for subscribers - not just the scrambled signals in the homes of non-subscribers. As the district court found, the time-channeling that Section 505 requires as a practical matter "amounts to the removal of all sexually explicit programming at issue during two thirds of the broadcast day from all households on a cable system." *Id.* at 718.

There can be no question but that Section 505 is content-based regulation designed to suppress free speech that is disfavored by some but nonetheless fully protected under the First Amendment. The district court correctly ruled that Section 505 "is a content-based restriction on speech," *id.* at 714, that "restricts a significant amount of protected speech." *Id.* at 718. As such Section 505 must survive strict judicial scrutiny. The Government has the heavy burden of demonstrating, not just asserting, that Section 505 actually serves a compelling governmental interest that cannot adequately be met through less speech restrictive means. *See Sable Communications*, 492 U.S. at 126. This the Government has failed to do.

Playboy Television's programming, even if sexually explicit and even if "indecent" (whatever that overused and ill-defined term might mean in this context) is nonetheless fully protected expression. As this Court has recently reaffirmed, "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. American Civil Liberties Union*, 521 U.S. at 874, quoting *Sable Communications*, 492 U.S. at 126. The district court correctly observed that Playboy's programming cannot be considered marginal speech enjoying only diminished constitutional protection. 30 F. Supp. 2d at 714; *see also Denver*

³ See R. Thomas Umstead, *How Hot Is Hot?*, CABLEVISION, July 30, 1999, at 18.

Area, 518 U.S. at 804-05 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).⁴

Like the provisions at issue in *Denver Area*, Section 505 is a "content-based discrimination[]" in the strong sense of suppressing a certain form of expression that the Government dislikes or otherwise wishes to exclude on account of its effects, and there is no justification for anything but strict scrutiny here." *Denver Area*, 518 U.S. at 802 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). In its modern era this Court has always applied the "most exacting scrutiny" to such regulations of speech. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). See also *Reno*, 521 U.S. at 868 (applying "the most stringent review"); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("[c]ontent-based regulations are presumptively invalid"). There is no reason to depart from such analysis here.

B. Strict Scrutiny Is Particularly Appropriate And Necessary For Statutes Such As Section 505 Enacted Without Congressional Hearings, Legislative Findings Or Meaningful Debate.

The strictest judicial scrutiny of content-based statutes restricting free speech is especially appropriate and necessary when, as here, the political process arguably fails to protect against politically popular but ill-considered measures.

The district court tellingly recounted the legislative history of Section 505. The provision was offered by two Senators as a floor amendment to the 1996 Telecommunications Act after hearings and debate on the Act were concluded. There was no debate on the amendment and no hearings were held. Ninety-one Senators voted in favor and not one opposed the measure. See 30 F. Supp. 2d at 709-10. After all, what Senator wants to be portrayed as opposing an amendment, however unnecessary or constitutionally dubious, that its sponsors claim is necessary to protect children from sexually explicit television programming? If the choice is

⁴ That portion of Justice Stevens's opinion in *Pacifica* where he suggested a lower level of constitutional protection for some patently offensive sexual language was joined by only two other Justices. *Id.* at 742-49. Cf. *id.* at 761-62 (Powell, Blackmun, J.J., concurring in part and concurring in the judgment).

presented as one between Playboy and children, Playboy (and the Constitution) are overwhelmingly likely to lose, even though there is no real danger to, or benefit for, children.

Section 505 is hardly alone in this regard. At least at the congressional level, children are becoming a universal First Amendment solvent immediately dissolving vital constitutional constraints on government interference with freedom of expression. The Internet provisions at issue in *Reno* were Senate floor amendments to the Communications Decency Act of 1996 (the "CDA," part of the 1996 Telecommunications Act) adopted without hearings or meaningful debate. *Reno*, 521 U.S. at 858 n.24, 875-76 n.41. The 1992 Cable Act indecency provisions at stake in *Denver Area* were "adopted in a series of floor amendments, without benefit of committee hearings or even substantial floor debate." *Alliance for Community Media v. FCC*, 56 F.3d 105, 141 (D.C. Cir. 1995) (Wald, J., dissenting). And in *Sable*, the Court noted that the dial-a-porn bill was introduced on the floor, without a committee report, supported only by conclusory statements and without considered judgment by members of Congress as to the necessity for its restrictions. 492 U.S. at 129-30. As the Court concluded in *Sable*, such scanty legislative records are due little deference from courts when First Amendment rights are at stake. *Id.*

Only the continued, most exacting scrutiny by this Court of measures such as Section 505 can keep the asserted but unproven interests of children from becoming a blank check on the First Amendment. As Justice Souter stated: Strict judicial scrutiny "keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area*, 518 U.S. at 774 (Souter, J., concurring). And Justice Kennedy reiterated this crucial observation by noting that "strict scrutiny at least confines the balancing process in a manner protective of speech" and against "the apparent exigencies of the day." *Id.* at 784-85 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

"[T]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry

into its validity.” *Reno*, 521 U.S. at 875. *Amicus* of course realizes that Congress is not constitutionally required to make particularized findings in support of its legislation. But this Court has never simply deferred to legislative judgments in First Amendment cases. *Id.* at 875-76 (citing *Denver Area*, 518 U.S. at 741-42). See also *Turner Broad. Sys.*, 512 U.S. at 666; *Sable Communications*, 492 U.S. at 129; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 103 (1973). This Court should scrutinize with special care provisions such as Section 505, the products of superficial and politically charged legislative processes that trench so heavily on First Amendment rights. In short, strict scrutiny is the baseline rule for review of Section 505, see *Denver Area*, 518 U.S. at 800 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part), and there is no reason for the Court to depart from this approach here.

C. *Denver Area* Provides No Support For Any Standard Of Review Other Than Strict Scrutiny.

Amicus, candidly, is concerned that the Court not adopt what we respectfully urge is the misguided approach of the plurality in *Denver Area*. We support the result in *Denver Area* striking down the two mandatory cable provisions at issue there, based on the “close” or “heightened” scrutiny the plurality applied that might be termed “quasi” strict scrutiny. But we particularly see the plurality’s apparent reliance on *Pacifica* as misplaced. Compare *Denver Area*, 518 U.S. at 744, 747-48 (plurality opinion) with *id.* at 755 (opinion of the Court). Moreover, we believe that the plurality’s ambivalence in not making explicit the strict scrutiny that seems to be implicit in its opinion allows the Government to exploit the resulting confusion in its overreaching restrictions on free speech.

The plurality in *Denver Area* refers to “very serious practical problems,” “extraordinary need,” “the most serious problems,” “close judicial scrutiny,” “an extremely important problem,” “unnecessarily great restriction on speech,” “sufficiently tailored response,” and the like. 518 U.S. at 740-43. But such language lacks the comparatively well-defined and well-developed

touchstones of true strict scrutiny, namely demonstration of a compelling governmental interest and employment of the least restrictive means of regulation. The issue is not, as the plurality seems to suggest, one of choosing among competing analogies – print, broadcasting, common carrier – for the best way to categorize cable for regulatory purposes. See *id.* at 741-42. Rather, *Amicus* urges that content-based regulation such as Section 505 demands strict judicial scrutiny regardless of the media being regulated. Especially as the electronic media converge technologically, there are no significant differences among them that would justify such different constitutional treatment. See *id.* at 776-77 (Souter, J., concurring).

The difficulty that the *Denver Area* plurality opinion engenders is that it seems to allow, at least in some cases, substituting *ad hoc* balancing for strict scrutiny of content-based restrictions on free speech. See *Denver Area* at 818 (Thomas, J., concurring in the judgment in part and dissenting in part). When this happens, it is all too easy for freedom of expression to be balanced away, particularly if the well-being of children is ostensibly at stake. As Justice Kennedy said of the plurality opinion, it is “adrift ... it applies no standard, and by this omission loses sight of existing First Amendment doctrine.” *Id.* at 780-81 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). The crucial difference between the two approaches is perfectly captured by, on the one hand, Justice Souter’s joining the plurality’s exercise in balancing to adhere, in a period of media flux and consequent judicial uncertainty, to the maxim “[f]irst, do no harm,” *id.* at 778 (Souter, J., concurring), and, on the other hand, Justice Kennedy’s response that to do no harm the Court should apply strict scrutiny and “begin by allowing speech, not suppressing it.” *Id.* at 787 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Communications technology is changing so rapidly, and the competitive structure of the media industry is so dynamic, that it is easy to appreciate Justice Souter’s concern, three years ago in *Denver Area*, that courts “know too little to risk the finality of precision” when reviewing government media regulation. 518 U.S. at 778 (Souter, J., concurring). Nonetheless, as discussed in more

detail below (*see* Part I.D.4, *infra*), we do now know a good deal about the increased technical feasibility of parental control over children's access to undesirable material in electronic media. Indeed, we know enough that, in reviewing content-based regulations of speech such as the indecency provisions of Section 505 enacted in the name of protecting children, courts should have no hesitancy in holding Government to its high burden of proof of each of the elements required under strict scrutiny. This is the approach the Court has taken as to dial-a-porn in *Sable* and as to the Internet in *Reno*, and it is the approach the Court now should take as to the rest of the electronic media.⁵

D. *Pacifica* Is No Basis For Abandoning Strict Scrutiny Here.

Amicus believes that, as the dissent in *Pacifica* put it, the majority opinion there "unstitch[ed] the warp and woof of First Amendment law." 438 U.S. at 775 (Brennan, Marshall, J.J., dissenting). *See Action for Children's Television v. FCC*, 58 F.3d 654, 676 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1042 (1996) (Edwards, C.J., dissenting) (*Pacifica* now must be considered a "flawed decision ... [t]he critical underpinnings of the decision are no longer present."). Whatever the merits of the

⁵ Lack of strict scrutiny easily allows glaring inconsistencies in the lower courts. In *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1042 (1996) ("ACT"), the court upheld relegating broadcast "indecency" to a mandatory, late-night safe harbor based on a vague definition of such indecency and without any evidence of harm to children. *Id.* at 671-72 (Edwards, C.J., dissenting) (noting that there is "not one iota of evidence in the record" as to the harmful effects on children from indecent broadcast programming). Yet, just a year later in *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996), the same court (in an opinion written by the author of the ACT majority) would not allow a broadcaster to channel to late-night hours campaign advertisements including graphic pictures of aborted fetuses that could be harmful to children. Here the court realized such content-based judgments are entirely subjective and based on "slippery standards," 95 F.3d at 81, and that such channeling would induce self-censorship and relegate affected programming to a "broadcasting Siberia" to the detriment of adult audiences. *Id.* at 83-84.

The Supreme Court's clear application of strict scrutiny to such issues should preclude such irreconcilable results that are particularly intolerable in the context of the First Amendment.

Pacifica decision when it was rendered in 1978, *Amicus* urges that it carries little weight today.

Pacifica was decided by a bare five-Justice majority with sparsely developed rationales and over sharp dissents.⁶ *Pacifica* also was an exceedingly narrow decision that rightfully has had little material impact. Most importantly for present purposes, technological advances allowing much greater parental control over what children can see on television have rendered *Pacifica* woefully out of date. The *Denver Area* plurality's ambivalent treatment of *Pacifica*, compare 518 U.S. at 744-45, 747-48 (plurality opinion) with *id.* at 755 (opinion of the Court), now creates a substantial danger to First Amendment interests. Such an opinion inappropriately seems to endorse *Pacifica* for a general proposition of broad scope, allowing extensive restriction of protected free speech, well beyond any reasonable import of *Pacifica* itself. *Amicus* therefore urges the Court to clarify the point that *Pacifica* no longer can be relied on to sustain restrictions on indecency in electronic media and that, instead, regulations dealing with this issue must pass strict scrutiny.

1. The Rationales The Court Relied On In *Pacifica* Do Not Withstand Current Analysis.

Pacifica was a radio case, but the scarcity rationale for sustaining regulation of broadcasting that otherwise would violate the First Amendment was irrelevant to the indecency issue there. The Court therefore advanced two new rationales - the unique pervasiveness and intrusiveness of broadcasting and its unique accessibility to children - sketched in one paragraph each with little explanation or analysis. *Pacifica*, 438 U.S. at 748-50. These factors, however, are no longer unique to broadcasting; they apply to all electronic media including cable, satellite and the Internet. Moreover, these somewhat amorphous factors by themselves have little distinguishing or explanatory power. A blaring boom box at a beach, for example, might be both pervasive and invasive

⁶ One member of the FCC that decided *Pacifica* has confessed his "present embarrassment" at his "complicity" in that matter. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L.J. 899, 948 n.182 (1998).

regardless of the station it is tuned to, but this is no basis for government content control. Television in the home may contain undesirable images some parents would prefer to keep from their children, but television viewing (whatever the source of the signal) is an open activity subject to direct parental control⁷ or, now, to indirect control through technology (see Part I.D.4, *infra*).

The majority in *Pacifica* also stressed the intrusion of a media signal into the privacy of the home where an individual's right to be left alone is primary. 438 U.S. at 748. But the Court now should recognize, as the majority in *Pacifica* did not, that the interest in privacy and in controlling media content in one's home cuts both ways. Those interests for many may well include, first and foremost, the freedom from government interference with access to media content of one's choice in the privacy of one's home. It is in the home, after all, where parents' interest in controlling the raising of their children is greatest and entitled to the greatest freedom from interference from the state. *Hutchins v. District of Columbia*, ___ F.3d ___, 1999 WL 397429, at *7 (D.C. Cir. 1999) (*en banc*). And, while encountering unwanted and indecent or offensive material in the home may heighten the affront for some, such affront may be considerably less for many others.

That is, the momentary offense from something on a television screen that then can be immediately avoided may be far less for many people when occurring in the privacy of their homes as opposed to exposure to similar material in the presence of others, and in social settings where avoiding further exposure may be more difficult. Moreover, many adults who may be embarrassed and inhibited by having to access sexually oriented material openly - standing in line at an adult theater or renting an adult tape at a video store - may welcome the easy, relatively anonymous availability of such material in the privacy of their homes.⁸ Unlike

⁷ One of the many ironies in *Pacifica* is that the only listener to complain about the broadcast of the George Carlin monologue heard it while driving his car in the company of his son and, rather than exercising parental control and turning the dial, chose to listen for an extended period. 438 U.S. at 729-30.

⁸ Ronald Dworkin makes a similar point in his well-known essay, "Do We Have a Right to Pornography?" in Ronald Dworkin, *A MATTER OF PRINCIPLE*, 355-56 (1985).

the one provision upheld in *Denver Area*, there is nothing permissive about Section 505; it is mandatory and results in late-night channeling of the affected programming. The Government makes the choice for all viewers rather than allowing individuals to choose for themselves in the privacy of their homes as the First Amendment requires. And, as the district court found, this governmentally imposed choice deprives adults who want Playboy Television and similar programming available in the privacy of their homes of their right to access it there during two-thirds of the broadcast day when 30-50% of adult programming is viewed. 30 F. Supp. 2d at 718.

Pacifica's unwarranted emphasis on media invasion of the home is highlighted by the strangeness of the result from several of the Court's opinions. If the sole complainant in *Pacifica* and his 15-year old son had driven by Erznosnik's outdoor movie theater, see *Erznosnik v. City of Jacksonville*, 422 U.S. 205 (1975), or stopped in front of Paul Cohen crossing the street wearing his emblazoned jacket, see *Cohen v. California*, 403 U.S. 15 (1971), they would have had to accommodate themselves to the momentary offense. Adjusting the car radio when confronted with the Carlin monologue, however, somehow is not an adequate remedy. And, in the home, where individual control is far greater and the discomfort for some considerably less, a broad governmental prohibition requires everyone to conform to official taste.

The *Pacifica* factors of pervasiveness, accessibility by children, and intrusion into the home all apply equally well to the Internet. The Court nonetheless applied strict scrutiny in *Reno* in striking down indecency provisions of the CDA. The Court now should apply the same analysis to all electronic media and no longer rely on *Pacifica*.

2. *Pacifica* Never Adequately Defined The "Indecency" That Can Be Regulated Nor The Class Of "Children" Who Supposedly Need Protection.

An additional weakness with *Pacifica* is that the Court never defined the concept of broadcast "indecency" that it allowed the Government to regulate. Indeed, this Court has never specifically

addressed whether the FCC's broad, generic definition of indecency is unconstitutionally vague. See *Alliance for Community Media*, 56 F.3d at 130 n.2 (Wald, J., dissenting) (citing *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988)). In *Reno*, however, the Court recognized the substantial danger to First Amendment interests from restrictions on "indecent" or "patently offensive" speech in electronic media that leave everyone guessing as to what such subjective terms might mean in practice. 512 U.S. at 877-78.⁹ The chilling effect on free speech is "obvious." *Id.* at 871-72. And this problem is compounded by the lack of a clear, and strict, standard of review missing in the *Denver Area* plurality. As Justice Kennedy noted, the language of this combined approach "end[s] up being a legalistic cover for ad hoc balancing ... [that] will sow confusion ... [and produce an] unprotective outcome." *Denver Area*, 518 U.S. at 786-87 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

The majority in *Pacifica* also was unclear as to who are "children" that need governmental protection from "indecency." The district court here found that two-thirds of all households in the United States have no "children." 30 F. Supp. 2d at 718. Of the remaining one-third, the "children" undoubtedly range from infants to high school and college-age young adults. The Government cannot reasonably maintain that it can treat all these widely divergent individuals alike with respect to exposure to sexually related materials. See *Reno*, 521 U.S. at 878. See Part

⁹ In its implementing regulations for Section 505, the FCC defined "indecent programming" as "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." Order and Notice of Proposed Rulemaking, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C.R. 5386, 5388, para. 9 (1996). This is essentially the same as the definition the Commission has adopted for regulating indecent broadcast programming, with "cable medium" replaced by "broadcast medium." But it is as meaningless to talk of community standards for nationwide media, see *Reno*, 521 U.S. at 877-78, as it is to try and qualify the definition medium by medium. In practice, as with Humpty Dumpty, such definitions mean whatever any Commission says they mean, and this is no way for the Government to operate under the First Amendment.

II.B.2 *infra*. Too facile reliance on *Pacifica*, however, allows the Government to avoid its appropriately difficult tasks of specifying exactly what speech it is restricting, with respect to exactly what audience, and exactly why. The strict scrutiny the Court should apply would require the Government to meet, if it can, the burdens the First Amendment requires before protected speech can be restricted.

3. With Its Many Deficiencies, *Pacifica* Had Little Legal Impact Before *Denver Area*, And The Court Should Not Now Resurrect This Troublesome And Out-Of-Date Decision.

Repeatedly in *Pacifica* itself the majority emphasized the narrowness of its decision confined to the very specific factual context presented there. 438 U.S. at 734-35, 738-39, 742, 744, 750. Immediately after the decision the FCC recognized that it had "no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast.... We intend strictly to observe the narrowness of the *Pacifica* holding." *WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (1978) (mem. op. & ord.). See also *Pacifica Found.*, 95 F.C.C.2d 750, 759-61 (1983) (mem. op. & ord.). Thereafter, when citing *Pacifica* this Court took pains to stress its "emphatically narrow holding" in that case. *Sable Communications*, 492 U.S. at 127; *Reno*, 521 U.S. at 869-70. See also *Bulger*, 463 U.S. at 74. For many years *Pacifica* was taken to be about just a single radio program "as broadcast." 438 U.S. at 735, 742. The case was essentially *sui generis* dealing only with the "verbal shock treatment," *id.* at 757 (Powell, J., concurring), from the constant repetition of seven dirty words.¹⁰

¹⁰ Another irony of *Pacifica* is that the repetition of offensive material that the Court there stressed is irrelevant for someone who takes momentary offense and turns off the program. Here, the relative constancy of sexually oriented programming on channels such as Playboy Television that Section 505 inartfully seeks to target is actually less reason to regulate such channels. As described below, such stations that are more likely to give offense to some people are easier to identify and then avoid or block through a variety of measures. See *Denver Area*, 518 U.S. at 833-34 (Thomas, J., concurring in the judgment in part and dissenting in part).

There is no reason for the Court now to extract some general principles from *Pacifica* and apply them broadly to newer forms of electronic media. This would be particularly inappropriate given the proliferation of new forms of electronic media allowing vastly increased control by users and viewers over the content they access. As the Court once noted in the context of broadcasting: "The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broad. Sys.*, 412 U.S. at 102. This is all the more true today of the entire electronic media industry. *Pacifica* is badly outmoded, and its dead hand should not be allowed to stifle freedom of expression for adults in a transformed, digital age of electronic communication.

4. *Pacifica* Is Technologically Out-of-Date And Should Not Be Followed.

In *Pacifica* the Court inappropriately dismissed a listener's ability to turn off the radio as a solution to the momentary offense from encountering undesirable material.¹¹ 438 U.S. at 748-49. Today, however, we have much greater viewer control over the signals that are received in the home, allowing consumers not just to turn off a signal but to screen and filter out in advance content that might be offensive or otherwise undesirable. The electronic age of communications, particularly as it rapidly is becoming digital, brings with it not only vastly increased power of consumers to access information of their choice but, similarly, the power to exclude that which they do not want. There is no reason to distinguish among cable, broadcast, satellite or the Internet in this regard, especially as they are converging technologically. In *Reno* the Court relied in part on user-based control of the technology to keep the Internet free of government restrictions. And not long ago the Court summarily affirmed a state court's

¹¹The majority opinion analogized that it is no remedy for an assault to run away after the first blow, but this ignores the difference between speech and conduct and the constitutional protection for the former. In contrast, the remedy of avoiding further exposure to offensive speech was central to the Court's decisions in both *Erznozik*, 422 U.S. at 210-11, and *Cohen*, 403 U.S. at 21-22.

invalidation of cable indecency measures based on the degree of subscriber and parental control over cable television. *Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). This approach of relying on user control that technology facilitates, rather than broad government fiat, should apply generally to electronic media.

As Playboy's brief undoubtedly will describe in more detail, there are a number of effective ways for parents or other adults to control the content of material they and their children are exposed to in their homes via the electronic media, particularly cable television at issue here. First and foremost, of course, parents can and should assure the well-being of their children by their presence and attention to their children and by the values they instill in their children. Parents have to prepare their children to deal with the world by themselves, and the Government should try to foster this most vital of parental roles, not supplant it. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). So, the only real issue concerns those circumstances when parents are unable to directly supervise their children. At these times parents effectively can use various technological means to facilitate raising their children as they individually see fit; there is no need for governmental mandate applying uniformly to all.

For the Internet, as the Court acknowledged in *Reno*, 521 U.S. at 876-77, parents can use ever more sophisticated and powerful software to filter the material their children can access. The V-chip and the quasi-voluntary ratings for broadcast programming provide the same sort of functionality for that media.¹² *See Denver Area*, 518 U.S. at 776-77 (Souter, J., concurring). Moreover, as the district court found, 30 F. Supp. 2d at 708, modern televisions and VCRs have lockout features whereby, using the remote control, parents can block all reception of an entire set of channels and keep their children from undoing this by maintaining custody of the remote control. This is similar to the programmable, complete block of "adult" channels that many hotel television systems now offer. In addition, for cable television the availability of lockboxes

¹²*Amicus* takes no position here on any constitutional issues that might arise from the V-chip system.

should dispose of any indecency issues. See *Denver Area*, 518 U.S. at 758-59. In particular, the content-neutral provision of Section 504 (47 U.S.C. § 560), requiring a cable operator, without charge, to fully block the audio and video programming on any channel a cable subscriber requests be so blocked, totally solves any problem of signal bleed. And this solution – a clear less restrictive alternative – operates at the appropriate, individually initiated level, not at the broad governmentally mandated level of Section 505. This approach thus reflects the soundest and most basic of First Amendment principles – that it is the speaker and the listener (or viewer), not the Government save in the most exigent circumstances, who should determine what messages are communicated, when and by what means.¹³

Aside from this modern, sophisticated technology there is another basic technology that perhaps has been lost in considerations of more exotic approaches. Any television or VCR easily could be equipped with a mechanical or electronic lock, controlled at the discretion of parents, that would prevent all use of the device except when the parents were willing to directly supervise their children's viewing. The technology clearly is available and economically feasible; indeed, it must be considerably easier and cheaper to implement than the V-chip. And, as with the V-chip circuitry, the FCC could mandate such locks on all receivers. But, unlike the ratings system the V-chip depends on, such locks *per se* raise no First Amendment issues at all. Such locks, like the other technological fixes described above, also would address the "latchkey kids" problem that worried the sponsors of Section 505. See 30 F. Supp. 2d at 709-10. There may be some mild inconvenience with such locks, but they could be

¹³The FCC has established a V-chip Task Force to ensure that system's effective implementation and is now widely disseminating information for parents on the various technologies available to them for control of electronic media content in their homes. See "Broadcast Television, Cable Television, Telephone & the Internet" on the FCC PARENTS' INFORMATION WEB PAGE at <www.fcc.gov/parents_information>. The FCC also has just enlisted Kermit the Frog to star in a public service announcement about the V-chip. See <www.fcc.gov/Speeches/Kennard/Statements/stwek956.html>. All this belies any Government claim that parents cannot be educated about their technological options and persuaded to use them if they wish.

made universally available at little cost to provide a complete solution without raising any constitutional issues. Such locks, alone, therefore have to be considered a less speech restrictive alternative precluding any more intrusive government regulation.

At a policy level, the basic locks serve another very salutary goal in fostering parental, not governmental, involvement and control. The Government should not be sanitizing television, eliminating what some deem offensive, so that parents and children can enjoy the latter's unsupervised access to an electronic babysitter. If parents do not wish to supervise their children, or employ one of the more sophisticated technologies to allow selective, unsupervised access, let them shut (and lock) the television. Perhaps if our children, who in their first eighteen years reportedly spend more time watching television than in school, begin to watch less and read more, we all may be far better off.

II. SECTION 505 CANNOT WITHSTAND EITHER STRICT SCRUTINY OR THE "HEIGHTENED" SCRUTINY OF THE *DENVER AREA* PLURALITY.

A. A Mere Generalized Interest In Protecting Children From Indecent Cable Programming Is Not Sufficient, By Itself, To Override The First Amendment Rights Of Adults.

Amicus certainly agrees that the Government has a "compelling interest" in protecting the physical and psychological well-being of children. See *Reno*, 521 U.S. at 869; *Denver Area*, 518 U.S. at 755. Indeed, it is impossible to challenge such a statement. That is the problem; it is so general a statement as to be trivially true, but it therefore lacks any analytical power. This interest also undoubtedly extends, in some circumstances, to protecting some children from exposure to some sexually explicit, even though not obscene, materials. *Reno*, 521 U.S. at 869-70. But as the Court noted in *Reno*, "that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* at 875. In other words, although children are a particularly vulnerable group, hypothesized harm to children cannot immediately override all other interests. When First Amendment rights are at stake, it is too

abstract and too facile just to talk generally about protecting children as a compelling governmental interest.

A simple example makes an important point. Each year in this country a statistically certain, substantial number of children suffer death or debilitating brain damage in drowning accidents in residential swimming pools.¹⁴ Unlike with the exposure of children to sexually explicit depictions on television, there is no uncertainty about the seriousness of the harm from these drownings or the likelihood of such harm's occurrence or magnitude. Moreover, home swimming pools are a luxury, not a necessity, and unlike freedom of expression they enjoy no constitutional protection. Yet we do not prohibit such pools and direct everyone to facilities at schools, community centers, or private clubs. Instead we allow backyard pools and rely on the proper supervision of children by responsible parents or other adults - assisted perhaps by technology in the form of pool fences or alarm devices - even though adults can be irresponsible, inattentive or absent, and even though children can evade parents' eyes or be exposed to danger at the homes of others.

Thus, the mere invocation of the need to protect children, however accurate, is not sufficient by itself to satisfy strict or "heightened" scrutiny designed to protect First Amendment rights. In *Turner Broad. Sys.*, for example, even when reviewing non-content-based regulation, the Court refused to accept that interests that are "important in the abstract" can in fact justify a particular regulatory burden. 512 U.S. at 664. Here, the Court should carefully analyze and evaluate the asserted governmental interests at stake and the reality and seriousness of the risk of harm, as well as the nature of that harm, and hold the government to an appropriately high burden of proof.¹⁵ It is one thing not to require

¹⁴See Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Drowning Fact Sheet at <www.cdc.gov/ncipc/duip/drown.htm> (reporting annual figures of about 500 drownings and 3,000 near-drownings in residential swimming pools among children younger than 5).

¹⁵Certainly the well-being of children is a general interest of the highest moment; but so is national security. Thus an admittedly imperfect analogy nonetheless makes an important point. When the President of the United States

definite scientific proof of harm to children from viewing sexually explicit programs, especially when the evidence comes from psychologists and other social scientists. But it is quite another matter, too inimical to free speech, to use the lack of scientific precision in this area as the basis for requiring little proof of harm beyond the bare assertion. See *Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) ("[a]ny 'predictive judgments' concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence"). If the Government is correct in this case, for example, as to the substantial harm to children from signal bleed - and it is hard to imagine it is correct here - then it should be able to actually demonstrate such harm, perhaps with the sort of convincing clarity and certainty that this Court requires in other cases when free speech interests are at stake. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) (requiring "convincing clarity" in proof of actual malice for defamation of a public official).¹⁶

If the Court does not insist on this sort of searching inquiry when harm to children is alleged to flow from their exposure to protected speech, children will become the universal First Amendment solvent referred to earlier. One court, for example, finding an

asserted an explicit and imminent threat to national security and to human life while the country was at war, this Court nonetheless refused to block the publication of stolen, classified government documents absent firm proof of actual danger, not just speculation and hypothesis. *New York Times Co. v. United States*, 403 U.S. 713 (1971). If the First Amendment mandates freedom of expression even in such exigent and compelling circumstances as presented by the Government in the Pentagon Papers case, certainly proliferating government attempts to restrict protected speech in the name of children should be strictly scrutinized and measured by a substantial burden of proof as well.

¹⁶Similarly, if the Government is correct as to the great danger to children lurking in signal bleed, why does it worry that "perhaps a large number of parents ... out of inertia, indifference, or distraction, simply would take no action to block signal bleed, even if fully informed of the problem and even if offered a relatively easy solution"? Gov't Brief at 33. The Government offers little by way of explanation for parents' strange indifference in the face of the grave danger it posits. The Government merely analogizes to alleged consumer reaction to negative option sales of goods or services that has no relation to parents' expected reactions when and if convinced of real danger to their children. *Id.* at n.23.

awkward lack of proof of harm to children from broadcast indecency, simply sidestepped the issue. The court just allowed Congress to "take note of the coarsening of impressionable minds" presumably caused by television indecency. See *Action for Children's Television*, 58 F.3d at 661-62. Such reliance on presumed congressional suppositions and intuitions not only is contrary to precedent, but it abdicates the courts' proper role in strictly reviewing content-based legislative infringements on protected speech, and soon would eviscerate the First Amendment.

Here, the Government is unable to show any substantial risk of significant harm to children from signal bleed. See 30 F. Supp. 2d at 710-11. The district court clearly was troubled by the "paucity" of evidence before both it and Congress. *Id.* at 716. Indeed, more generally, there is a notable lack of evidence of any harm to children from indecent television programming. See *Action for Children's Television*, 58 F.3d at 682 (Edwards, C.J., dissenting) ("There simply is no evidence that indecent broadcasts harm children."). Even when the Government is trying to validate restrictions on what this Court still considers to be somewhat lower value commercial speech, the Court consistently requires more than "mere speculation or conjecture"; rather, the Government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broad. Ass'n*, ___ U.S. at ___, 119 S. Ct. at 1932, quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). The plurality in *Turner Broad. Sys.* applied the same stringency to non-content-based regulations of cable. 512 U.S. at 644 (opinion of Kennedy, J.). *A fortiori* the Government should be held to at least an equally high burden of proof when protected speech is threatened by hastily adopted legislation such as Section 505.

Some parents may wish to shield their children from exposure to sexually provocative television programming they find offensive. Such desire is understandable, legitimate and worthy of respect. And such parents are entitled to some level of technological assistance that does not infringe the First Amendment rights of others. But this parental desire cannot be equated with, or substituted for, actual, demonstrated harm to children. The district court's legal conclusion, 30 F. Supp. 2d at 716, despite the paucity

of evidence before it, that the Government has established a sufficient risk of harm to children from signal bleed, is wrong, and it is important that this Court correct that error.

B. The Only Valid Governmental Interest At Stake Is To Provide Parents Who Want It The Appropriate Level of Assistance They Already Enjoy In Shielding Their Children From Exposure To Sexually Provocative Television Programming.

The Government asserts three interests in this case that the district court labeled compelling "in sum." 30 F. Supp. 2d at 717. Considering the vital First Amendment interests at stake, this Court should be much more exacting in individually scrutinizing the several asserted interests none of which, alone or in combination in this case, can be deemed substantial, let alone compelling. The analytical approach is at least as important as the result.

1. There Is No Substantial, Let Alone Compelling, Interest In Protecting Adults Themselves.

First, there can be little if any governmental interest in using Section 505 to protect adults, even in the privacy of their homes, from exposure to sexually objectionable or otherwise offensive material, let alone from the scrambled images of signal bleed. Adults can avoid such exposure for themselves in the first instance through any of the available technological measures discussed earlier, including use of the off/on switch. In particular, any adult who chooses to subscribe to cable can invoke Section 504 to have any unwanted channel fully blocked. In contrast, the safe harbor provisions of Section 505 - actually a "ship's graveyard," *Action for Children's Television*, 58 F.3d at 685 (Wald, J., dissenting) - uniformly restricts adults who may highly value the easy and anonymous accessibility of sexually explicit programming in the privacy of their homes.

Should total avoidance still somehow fail, adults once confronted can immediately turn away and change the channel. Adults' momentary discomfort from encountering offensive expression is a small price, among the many vicissitudes of life, that we pay for First Amendment freedoms. See *Erznoznik*, 422

U.S. at 210-11; *Cohen*, 403 U.S. at 21-22, 25. The largely incomprehensible nature of signal bleed makes this an especially trivial problem here. Any asserted governmental interest in protecting adults themselves can be readily and completely discounted.

2. There Is No Substantial or Compelling State Interest Here In Protecting Children Over And Above The Desires Of Parents.

The Government also asserts an interest in protecting children from exposure to patently offensive sex-related material, apparently regardless of, or even contrary to, the wishes of parents. This is untenable, especially given the amorphous, uncertain and unproven nature of the alleged harm to children, and the chilling vagueness of the concept of indecency. Moreover, the Government's position is inconsistent with the Government's asserted interest in supporting parents' authority and ability in inculcating morals and beliefs in their children as they see fit. As the district court recognized, this Court long has given substantial preference to parents, not the state, in the raising of children. 30 F. Supp. 2d at 717. *See Reno* at 865 ("parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (upholding the fundamental "liberty of parents and guardians to direct the upbringing and education of children under their control"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition").

This parental interest is strongest within the home. *Hutchins v. District of Columbia*, ___ F.3d at ___, 1999 WL 397429, at *7. As Chief Judge Edwards noted in *Hutchins*, "when Government does

intervene in the rearing of children without regard to parents' preferences, 'it is usually in response to some significant breakdown within the family unit or in the complete absence of parental caretaking,' *Action for Children's Television v. FCC*, 58 F.3d 654, 679 (D.C. Cir. 1995) (Edwards, C.J., dissenting), or to enforce a norm that is critical to the health, safety, or welfare of minors." ___ F.3d at ___, 1999 WL 397429, at *16 (Edwards, C.J., concurring in part and concurring in the result). The Government can demonstrate no such general breakdown and has not demonstrated any such critical norm. So long as parents have available reasonable means to control television content accessed in their homes, as they so clearly already do, there is no need or basis for further, mandatory and uniform state intervention.

Intellectual and emotional development and maturity are highly individualistic and variable among children. Chronological age, the basis on which the state regulates, is a very poor measure of these crucial cognitive factors central to First Amendment theory and practice.¹⁷ Parents, not the state, are in the best position to know their own children, assess their development on an individual basis, determine the values they wish to transmit to their children, and make appropriate decisions. As the dissent in *Pacifica* put it, only "acute ethnocentric myopia" can account for the Government not realizing that some parents see value in exposing, on an individual, considered basis, their children to material others find offensive and inappropriate. 438 U.S. at 775 (Brennan, Marshall, J.J., dissenting). Indeed, the Carlin monologue at issue in *Pacifica* was broadcast not for its comedic value but as part of the station's serious discussion of contemporary attitudes toward language, something many parents might well wish their children to hear. 438 U.S. at 730, 770, 775-76.

¹⁷It is one thing for the state to regulate, say, a license to drive by chronological age as a general proxy for individual maturity and capacity to drive. It is quite another matter to regulate freedom of expression in this indiscriminate way, particularly when parents are available and able to make these formative decisions for their own families on an individual basis. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

There is no national consensus for the Government to enforce as to what is suitable for a broad, indiscriminate class of "children," any more than there is such consensus on what is one person's vulgarity or another's lyric. See *Cohen*, 403 U.S. at 25. The state has no "general power ... to standardize its children." *Yoder*, 406 U.S. at 232-33 (quoting *Pierce*, 268 U.S. at 535). Only a clear and convincing demonstration of harm, not present here, could begin to justify displacing individualized parental choice by uniform governmental fiat. Otherwise the Government's asserted independent interest in the well-being of children is irreconcilable with its primary interest in encouraging and providing support for parental supervision and authority. *Action for Children's Television*, 58 F.3d at 672 (Edwards, C.J., dissenting) ("the Government's asserted interests in facilitating parental supervision and protecting children from indecency are irreconcilably in conflict in this case").

3. The Only State Interest of Any Merit Here Is In Giving Parents Who Desire It The Appropriate Level of Assistance To Control Television Programming In Their Homes Consistent With The First Amendment Rights of Others. Parents Already Enjoy That Measure of Control Without Section 505.

When parents can directly supervise their children's use of television there is no reason for the Government to be involved in the choice of what they watch. No one would suggest that parents renting certain movies from a video store could be made to sign a pledge that they will not allow any child under eighteen to watch it. See *Ginsberg*, 390 U.S. at 639 ("the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children"). The only legitimate regulatory interest at stake here involves the ability of parents to control exposure of their unsupervised children to patently offensive sexually explicit material (or, indeed, to other programming parents might find objectionable for a wide variety of idiosyncratic reasons). Some parents have a legitimate interest in preventing some of their children from exposure to some sexually explicit or otherwise objectionable material, under some circumstances, some of the time, and can legitimately expect some level of

technological assistance from the government in implementing those parental choices consistent with the First Amendment mandate of freedom of expression for adults. This is the interest that the Court should carefully scrutinize.

The Court has always insisted that parents have the "primary responsibility for children's well-being" and are "entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg*, 390 U.S. at 639. When the interest at stake and the limited role of Government are properly described, resolution of most cases of indecency on electronic media, especially the instant one, should be fairly straightforward, given the level of technological control readily available to parents. This remains true even though some concerned parents may closely supervise their children in their own homes but worry about what their children are exposed to in the homes of others. Children may be exposed outside their own homes to all sorts of books, magazines, language, behavior and the like that their own parents would find objectionable. Again, this is a matter for parents to deal with through the discriminating way they raise their own children; Government cannot sanitize the world for all children in the parochial, even if legitimate, interests of a few.

As the district court observed, the scope of the problem signal bleed presents - the potential for unsupervised exposure of children to signal bleed - is quite uncertain and probably minimal. 30 F. Supp. 2d at 708-09. Moreover, this uncertainty and the lack of proof of any real harm to children is reflected in the apparent lack of much parental concern. One lower federal court recently overcame the embarrassing lack of evidence of harm to children from broadcast indecency by simply asserting, without any basis, that there is a "broad national consensus that children under the age of 18 need to be protected from exposure to sexually explicit materials." *Action for Children's Television*, 58 F.3d at 664. But courts should not be able to substitute such overbroad and unwarranted assertions for the careful judicial scrutiny the First Amendment demands.

The potential for any harm here from signal bleed is truly minimal, certainly less serious than the problem of children somehow obtaining access to and watching a full-length, hard-core

pornographic film. While the Government highlights a few egregious examples, Gov't Brief at 5-6, it is almost comical to imagine young teenagers virtually going dizzy sitting in front of a scrambled TV picture for hours for a few fleeting glimpses of a partially unscrambled, discernible but still distorted, "indecent" video. This is not content likely to be encountered accidentally, see *Reno*, 521 U.S. at 854, but only by "a few of the most enterprising and disobedient young people." *Sable Communications*, 492 U.S. at 130. This Court has never required a foolproof method of erecting a perfect, hermetic seal over children. *Id.*; *Denver Area*, 518 U.S. at 759.

C. Section 505 Is Far From Being The Least Speech Restrictive Approach.

As *Amicus* has argued, the Court should apply strict scrutiny to Section 505, a content-based restriction on protected speech. Even under the "heightened" scrutiny approach of the *Denver Area* plurality or *Turner Broad. Sys.*, 512 U.S. at 641-42, however, Section 505 clearly violates the First Amendment as there are many considerably less speech restrictive approaches to the problem of signal bleed. Like the provisions of the CDA at issue in *Reno*, "[i]n order to deny minors access to potentially harmful speech, [Section 505] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." 521 U.S. at 874.

First and foremost, parents can supervise their children and educate them to deal with sexually explicit programming. Moreover, as to indecent television programming generally, several approaches are available: a V-chip approach could be applied more broadly; parents can use remote controls to lock out specific parent-selected channels; televisions can be equipped with parent-controlled mechanical or electrical locks.

Specifically as to signal bleed, Section 504 is a complete content-neutral solution, one that Congress itself endorsed in a companion provision to the more drastic Section 505 challenged

here. The lock-out that Section 504 requires is free and available upon demand of any parent who wants it. The Court should not presume that any of these plausible alternatives, and particularly Section 504 that is specifically designed to address signal bleed, will fail to adequately protect the interests at stake. See *Denver Area*, 518 U.S. at 807 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Instead, the Government has the heavy burden to show that a plausible less restrictive alternative would not be sufficiently effective. See *Reno*, 521 U.S. at 877-79. This the Government has not and cannot do.

There are strong policy reasons to rely on the less restrictive approach of Section 504. Informed parents, not the Government, should control media content in the home. With Section 504 the initiative for such control comes, as it should, from the user - the viewer and consumer - not from the supplier of information and programming, and certainly not from the Government. This is the approach the Court appropriately relied on in *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), in upholding a statute allowing a householder, at his or her initiative and request, to control sexually provocative mailings to the home, and this is the approach the Court now should apply here.¹⁸ This approach fosters parental involvement and individualized, discriminating selection of media programming on a home-by-home basis and properly rejects the broad censorial approach of government dictate. See *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73-74 (1983) (parental discretion, not a statutory ban, is the preferred method of dealing with unsolicited contraceptive advertising mailed to the home).

The Government, of course, can, as it already is doing,¹⁹ inform and educate parents as to their many effective options to control

¹⁸The majority in *Pacifica* cited *Rowan* in support of privacy in the home without adequately appreciating that *Rowan* depends on private, individual initiative and control and not intrusive and universal government mandate. 438 U.S. at 748.

¹⁹See footnote 13 *supra*.

the material that is received in their homes. Government can exhort parents to be involved and use these various options. It may even be appropriate to enhance the effectiveness of Section 504, as the district court did, by enlisting specific efforts by cable programmers and operators to adequately inform parents about signal bleed and the free availability of total blocking devices. 30 F. Supp. 2d at 719-20. *See also Denver Area*, 518 U.S. at 759 (favoring informational requirements and lockboxes over "segregate and block" mandates). But with the more than adequate less restrictive alternatives available for discretionary use by parents, such educational efforts form the limit of governmental intrusion that the First Amendment tolerates.

CONCLUSION

For the foregoing reasons, the Court should apply strict scrutiny to Section 505 and affirm the judgment below.

Respectfully submitted,

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September 24, 1999

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No. 98-1682
In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

UNITED STATES OF AMERICA, ET AL.,
APPELLANTS

v.

PLAYBOY ENTERTAINMENT GROUP, INC.
APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIEF OF AMICUS CURIAE
THE THOMAS JEFFERSON CENTER FOR
THE PROTECTION OF FREE EXPRESSION

In support of the Appellee

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

The Thomas Jefferson Center for the Protection of Free Expression is a non-profit, non-partisan organization in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of freedom of speech and press from threats in many different forms. The Center pursues that mission in several ways, notably by filing amicus curiae briefs in cases that raise important free expression issues. The Center, joined by the Media Institute, filed such a brief with the district court in this case.

¹Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support.

SUMMARY OF ARGUMENT

The district court correctly ruled that Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, Tit. V., Stat. 136, "is a content-based restriction" on fully protected expression. *Playboy Entertainment Group, Inc. v. U.S.*, 30 F. Supp. 2d 702, 14 (D. Del. 1998). The court below was also correct in finding that this law "restricts a significant amount of protected speech" -- specifically because it targets "solely sexually explicit programming." *Id.* at 715, 718. The district court ruled in complete accord with this Court's free speech and press holdings that such material does not forfeit First Amendment protection because of its content. *Id.* at 714. Even assuming, as the district court did, that such a statute might possibly serve a compelling governmental interest, the ready availability of less restrictive alternatives -- most notably the content-neutral alternative which Congress itself recognized and

endorsed in a companion provision of the same Act -- renders the challenged statute unconstitutional. *Id.* at 717, 718.

Reliance upon such an alternative, moreover, reflects the soundest and most basic of First Amendment principles -- that it is the speaker and the listener (or the viewer), and not the Government save in the most exigent circumstances, who properly decide what messages are to be communicated or received, when and by what means. For these reasons, amicus respectfully urge the affirmance of the judgment below.

The district court also addressed the nature of the Government's asserted interest in barring the transmission of sexually explicit material that could be accessed by young viewers. *See id.* at 716. While each of several claimed interests might, standing alone, not have seemed "compelling", the court below recognized *arguendo*, by aggregating those interests, a potentially valid regulatory rationale. *Id.* at 717. Amicus respectfully takes issue with that analysis, since it rests heavily

on this Court's very narrow judgment in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Reliance here on *Pacifica* is troubling for four reasons: First, the statutory provision invoked in *Pacifica* -- a ban on "indecentcy" -- has an understood meaning that the wholly different term "sexually explicit" lacks. *See id.* at 740. Second, the medium to which *Pacifica* applied was licensed broadcasting, not cable; this Court has consistently disabled attempts to expand *Pacifica* to other media, including cable. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994).

Third, the nature of the sanction upheld in *Pacifica* was markedly less severe and less pervasive -- both for the broadcaster and for the listener/viewer -- than is the sweeping restriction which is the focus of this case. *See Pacifica*, 438 U.S. at 730. Finally, and most important, the very premises on which *Pacifica* rests have been steadily eroded in the last two decades, leaving grave doubt whether it should today be reaffirmed even

in the narrow context to which it originally applied. *See e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). Thus amicus respectfully urges this Court to assess with utmost care the district court's rationale for positing a compelling government interest behind the challenged restriction.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE CHALLENGED STATUTE IS INVALID BECAUSE IT RESTRICTS A SUBSTANTIAL AMOUNT OF PROTECTED EXPRESSION, DESPITE THE AVAILABILITY OF A MUCH LESS RESTRICTIVE ALTERNATIVE.

Central to the judgment of the district court was its early and clear recognition that the challenged statute severely restricts protected expression. *Playboy*, 30 F. Supp. 2d at 714, 718. The fact that the medium is cable, and that the targeted material is "sexually explicit", in no way dilute that protection. *Id.* at 714. As for the medium, this Court's *Turner* decisions

make clear that "heightened First Amendment scrutiny" is the appropriate standard even for review of content-neutral measures. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) ("*Turner I*"); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 186 (1997) ("*Turner II*"). Moreover, when the restriction is clearly content-based, as the district court found to be the case here, the need for the most rigorous First Amendment review is even clearer. *Playboy*, 30 F. Supp. 2d at 715.

The content, which this law targets, is also unmistakably protected. Decisions of this Court have emphasized repeatedly that expression which is "sexually explicit", but is not obscene or does not contain child pornography, and falls within none of the other narrow exceptions, is fully protected under the First Amendment. *See Jenkins v. Georgia*, 418 U.S. 153 (1974). While dissemination of such material to minors may be regulated, *Ginsberg v. New York*, 390 U.S. 628 (1968),

measures which -- even for the most appealing of reasons -- deny adult access to protected material are clearly invalid, *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957). The First Amendment has no tolerance for a law which -- to paraphrase *Butler* -- "reduces the adult population . . . to [viewing] only what is fit for children." *Id.* at 383.

The impact on expression here is far from incidental or peripheral. The district court found, indeed, that the challenged provision "restricts a significant amount of protected speech." *Playboy*, 30 F. Supp. 2d at 718. Of the responses a cable operator could conceivably make to such a scrambling requirement, by far the likeliest course (indeed, probably the only technically workable option) would be time-channeling -- a choice which, the district court found, "amounts to removal of all sexually explicit programming at issue during two thirds of the broadcast day from all households on a cable system." *Id.* The drastic and sweeping nature of the challenged restriction --

quite as much in withholding protected material from the viewer as in curbing the cable operator's speech -- is thus a key to the district court's judgment.

Given the scope of such a ban on protected expression, the availability of less restrictive alternatives becomes crucial. In most cases where a speaker invokes possibly benign alternatives, speculation is not only appropriate but essential. Rarely does a law that unduly curbs speech also endorse a less drastic alternative. Here, however, speculation is quite unnecessary. Almost uniquely, the very alternative that "undercut[s] significantly" the challenged restriction, *Boos v. Barry*, 485 U.S. 312, 329 (1988), is to be found in the companion provision of the very statute in issue. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 133; § 504, 100 Stat. 136.

Such an alternative is much more clearly available here than, for example, in the closely analogous context of attempts to bar "indecent" telephone calls. In *Sable Communications*,

Inc. v. FCC, 492 U.S. 115, 129 (1989), this Court rejected such curbs, in part because "the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors." Here, to the contrary, far from foreclosing less restrictive alternatives, Congress *endorsed* the very alternative that renders unnecessary the more drastic measure challenged here. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 133; § 504, 100 Stat. 136.

The lockbox alternative is not merely a technically preferable solution. The opportunity for viewers to ask that cable operators selectively block unwelcome material also fits far better in the framework of our Bill of Rights. It has long been the central premise of our First Amendment that, with few and narrow exceptions, it is for the speaker and the listener or viewer to determine what messages shall be communicated,

when and by what media. The availability of a lockbox option clearly reflects that belief, since it enables the listener/viewer to bar receipt of material he or she may not wish, without depriving any other adult viewer of that same material. Where such an option exists, this Court's consistent judgment in First Amendment cases like *Boos v. Barry* make clear that, it must be favored over more restrictive -- indeed, by definition *unnecessarily* restrictive -- measures by which to serve even a valid underlying interest.

II. THE DISTRICT COURT GAVE UNDUE DEFERENCE TO THE ASSERTED GOVERNMENT INTEREST, BY RELIANCE ON THE *PACIFICA* DOCTRINE.

The district court would not have reached the issue of less restrictive alternatives had it not assumed the existence of a valid regulatory interest. While none of the asserted interests, standing alone, might have sufficed, their aggregation seemed to the court below sufficient -- "three interests which in sum can be labeled 'compelling.'" *Playboy*, 30 F. Supp. 2d at 717. That

court's reluctance to identify as constitutionally adequate any one of those interests, standing alone, should invite caution in any further analysis of the Government's claims. Moreover, the district court's deference to the several asserted interests rested almost totally on this Court's narrow judgment in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Amicus respectfully urges that, to the extent the claimed government interests receive this Court's attention, reliance on *Pacifica* be disavowed.

We offer four specific grounds for distinguishing *Pacifica* in this setting. First, the expressive medium here is cable, not the licensed broadcasting to which *Pacifica* has been uniquely applied. Cases such as *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 127 (1989), stressed the "emphatically narrow holding" of *Pacifica*. When it came to cable, this Court continued that limiting process, in *Turner I*, 512 U.S. at 639: "Application of the more relaxed standard of scrutiny adopted

in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation."

That rejection of *Pacifica* accompanied a regulation which the *Turner I* plurality, at least, deemed to be content-neutral. See 512 U.S. at 640-41. Where the regulation is content-based, as the district court correctly ruled in this case, the inapplicability of *Pacifica* seems far more obvious.

Most recently, in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), this Court reemphasized the narrowness and medium-specific nature of *Pacifica*, and its clear inapplicability to the Internet. See *id.* at 868-70. Any suggestion that *Pacifica* might justify measures to ban from cable any type of material deemed inappropriate for young viewers is thus clearly incompatible with this Court's most recent and pertinent ruling. See *id.* at 875 (holding that *Pacifica* does not support the proposition that "the level of discourse reaching the mailbox simply [should] be limited to that which

would be suitable for a sandbox”) (internal quotations marks and citation omitted).

Nor, given the dramatically different nature of the sanctions, is anything in *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), to the contrary. Indeed, the only one of the three challenged provisions that this Court sustained in *Denver Area* was wholly permissive in nature, while the provision most closely analogous to the mandatory curb now before the Court was deemed clearly violative of First Amendment rights of both viewers and cable operators. Compare *id.* at 743-47 (holding that “the permissive nature of the provision [which permits cable operators to decide whether or not to broadcast sexually explicit programs on leased access channels] . . . is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating . . . First Amendment interests”), with *id.* at 755-60 (finding “separate and block”

requirements “overly restrictive, ‘sacrific[ing]’ important First Amendment interests for too ‘speculative a gain’”) (alteration in original, citation omitted). Thus, to the extent that *Denver Area* bears upon the present case, it reinforces the district court’s ruling.

Second, the nature of the substantive standard in this case is also profoundly different. *Pacifica* sustained very limited application of a ban on “indecent” material, a term that had been in federal law regulating broadcasters from the very beginning and that over time acquired an accepted or understood meaning. See *Pacifica*, 438 U.S. at 735-38; *Reno*, 521 U.S. at 867. Nothing in this Court’s decisions offers any comparable basis for sustaining even a limited ban on “sexually explicit” material in any medium, much less in cable.

To the contrary, “sexually explicit” but non-obscene material is fully protected by the First Amendment. See *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (holding that “nudity

alone is not enough to make material legally obscene under the *Miller* standards" and, therefore, "outside the protection of the First and Fourteenth Amendments . . ."). Moreover, the absence of any definition in the statute of this central term—one which defines coverage both of cable operators and of particular material that they transmit—further undermines any *Pacifica*-based claim of deference to this quite different standard.

Third, the marked difference in the nature of the sanctions should also be dispositive. The sanction this Court allowed in *Pacifica* was quite limited. See *Pacifica*, 438 U.S. at 750 n.28 (noting that "the Commission has not unequivocally closed even broadcasting to speech of this sort"). Indeed, when this Court was asked to extend *Pacifica* to "indecent" telephone messages, that very difference proved to be crucial: "*Pacifica* is readily distinguishable from this case, most obviously because it did not involve a total ban on broadcasting indecent material." *Sable*, 492 U.S. at 127. Again, in *Reno*, this Court invoked the

very limited nature of *Pacifica*'s sanction as a basis for distinction: "The [Commission's] order . . . targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium." *Reno*, 521 U.S. at 867. As the district court described in considerable detail, the scope and reach of the sanction challenged here are dramatically broader and more pervasive in reach as to both cable operators and viewers. See *Playboy*, 30 F. Supp. 2d at 711-13, 717-18. That court concluded that the challenged law "restricts a significant amount of protected speech." *Id.* at 718. If cable operators complied with the restrictions in the likeliest way, the inevitable effect would be "the removal of all sexually explicit programming at issue during two thirds of the broadcast day from all the households on a cable system." *Id.* Such a contrast to the sanctions in *Pacifica* is much more than simply a difference of

degree, and serves further to attenuate the potential force of *Pacifica* as support for the regulatory interests advanced here.

Finally, and most basically, amicus respectfully urges that the passage of time and vast changes in technology have gravely undermined *Pacifica* even in the limited context of licensed broadcasting. *Pacifica*, like *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), before it, relied heavily upon concepts of “scarcity” which were of doubtful value at the time, (see *Pacifica*, 438 U.S. at 748; *Red Lion*, 395 U.S. at 393-94), and which have long since vanished from the real world of mass communications. Cf. *Reno*, 521 U.S. at 868-70 (holding that cases such as *Pacifica* and *Red Lion* “provide no basis for qualifying the level of First Amendment scrutiny that should be applied” to the Internet).

There is a special irony in suggesting that any notion of “scarcity” should apply to cable, with its nearly infinite range of available channels, at a time when few even of our largest

metropolitan areas have more than two daily newspapers—and when, as this Court observed in *Reno*, “any person or organization with a computer connected to the Internet can ‘publish’ information.” 521 U.S. at 853. Yet continued deference to judgments like *Pacifica* and *Red Lion* seems to reflect a belief that “scarcity” in mass media persists at the close of the century.

Pacifica also rested on at least two other premises—that the privacy of the home should be shielded from invasive affronts by offensive material, and that children deserve special protection from such material. See *Pacifica*, 438 U.S. at 748-50. The passage of time has surely not—in contrast to the “scarcity” concept—made such values less tenable. What has happened, however, is that dramatic changes in communications technology, together with a higher confidence in parental choice and control of family viewing and listening, have undercut

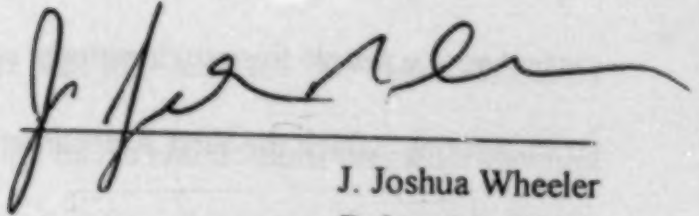
Pacifica's premises to a comparable degree. *See Reno*, 521 U.S. at 870.

As the present case admirably illustrates, technology now enables mass media to serve the First Amendment imperative of not "reduc[ing] the adult population [to viewing] . . . only what is fit for children." *See Sable*, 492 U.S. at 128 (internal quotation marks and citations omitted). Options like the lockbox, which Congress specifically recognized and endorsed in this very statute, now offer families (at least on cable) discrete and selective viewing choices that simply did not exist at the time of *Pacifica*. *See Playboy*, 30 F. Supp. 2d at 718- 20. If, as the district court concluded, the privacy of the home and the sensitivities of young viewers can be fully ensured by means that do not impinge on adult choices among protected material, the need for such cruder and broader sanctions simply disappears. *See id.*

Finally, this Court addressed similar concerns in *Reno*. Early in its opinion, the Court candidly recognized the extensive availability of sexually explicit material on the Internet. *See Reno*, 521 U.S. at 853-55. Nonetheless, the Court concluded that the means and the standard Congress had adopted to protect young people from such material could not withstand the strict scrutiny, which the First Amendment required. *See id.* at 849. The issue posed here is strikingly similar, and should be resolved in comparable fashion. Without in any way denigrating the importance of the privacy of the home or the needs of young viewers, amicus urges that *Pacifica* provides no sounder basis for broadly restrictive sanctions on cable communication than for such curbs on Internet speech.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully
urges the affirmance of the judgment of the district court.

A handwritten signature in black ink, appearing to read "J. Joshua Wheeler", is written over a horizontal line.

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(11)
No. 98-1682

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,

Appellants

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,

Appellee

ON APPEAL

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE
EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
COMIC BOOK LEGAL DEFENSE FUND, FREEDOM TO READ
FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS
ASSOCIATION, MOTION PICTURE ASSOCIATION OF AMERICA,
INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC.,
NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS,
PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC.,
PUBLISHERS MARKETING ASSOCIATION, RECORDING INDUSTRY
ASSOCIATION OF AMERICA, INC., AND VIDEO SOFTWARE
DEALERS ASSOCIATION AS
AMICI CURIAE
IN SUPPORT OF APPELLEE

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IN THE

Supreme Court of the United States

No. 98-1682

UNITED STATES OF AMERICA, ET AL.,

Appellants

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,

Appellee

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEE

STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation ("FTRF"), International Periodical Distributors Association, Motion Picture Association of America, Inc., National Association of College Stores, Inc., National Association of Recording Merchandisers, Periodical and Book Association of America, Inc., Publishers Marketing Association, Recording Industry Association of America, Inc., and Video Software Dealers Association submit this joint amicus brief in support of appellee urging that this Court

affirm the decision below.¹ This brief is submitted upon written consents of counsel to appellant and appellee, which are submitted herewith.

INTEREST OF AMICI

Amici's members (hereinafter "*amici*") publish, produce, distribute, sell and are consumers of books, magazines, videos, sound recordings, motion pictures, interactive games and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by FTRF provide such materials to readers and viewers. *Amici*, who include mainstream providers of speech in a variety of forums and media, are concerned that the restrictions imposed by Section 505 of the Telecommunications Act of 1996 (the "Act") on "sexually-oriented programming" will have the inevitable effect of suppressing altogether the transmission of such programming on certain cable channels, notwithstanding the ready availability of less restrictive, non-governmentally imposed means of protecting minors from the harms purported to flow from such programming.

Section 505 provides that so-called "indecent" programming on a cable television channel "primarily dedicated to sexually-oriented programming" must be fully scrambled or blocked so that a non-subscriber does not receive any portion of the video or audio (so-called "signal bleed"). Until such blocking or scrambling is achieved, all such programming must be during late night hours (10 p.m. to 6 a.m.).

The court below permanently enjoined the enforcement of Section 505 as unconstitutional under the First Amendment because it did not constitute the least restrictive alternative for dealing with the problem of signal bleed. The government appealed, contending that the statute was constitutional.

In the current environment of rapidly developing and integrating media technology, the once discrete worlds of print and

¹ A description of the *amici* is attached as Appendix A.

electronic media are discrete no longer. *Amici* once devoted exclusively to the publication of books and magazines are now or soon will be making some of those same materials available on-line via telephone lines linked to personal computers and via coaxial cables connected to television sets. Indeed, the expansion of appellee Playboy Entertainment Group, Inc. ("Playboy") from print into cable television exemplifies the exciting fluidity with which content-providers are approaching the expanding potential of the new media to reach wider audiences. Thus, the constitutional issues presented by Section 505 of the Act directly affect all media.

Amici submit this brief to highlight the very real danger of allowing the government to enact legislation targeting currently unpopular speech. When the government restricts politically disfavored but constitutionally protected speech -- the very kind of speech at issue here -- it violates the rights not only of the restricted creators and distributors, but also of mainstream consumers who depend upon a wide variety of materials and who would rather discriminate in their consumption themselves than allow the government to dictate those choices.²

In the past, many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on the First Amendment. See, e.g., *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992); *Village Books v. Bellingham*, No. C88-1470 (W.D. Wash. Feb. 9, 1989); *American Booksellers Ass'n, Inc. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d

² The Court has assiduously protected the "right to receive information and ideas." See, e.g., *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976); *Consolidated Edison Co. v. Public Serv. Comm'n.*, 447 U.S. 530, 541 (1980); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557 (1980).

520 (Tenn. 1993); *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738 (Tenn. 1979).

Section 505 of the Act continues a disturbing trend by Congress of regulating so-called "indecent" but non-obscene speech.³ This trend, if unimpeded, will substantially erode the ability of *amici* to publish, distribute and otherwise disseminate mainstream materials with significant literary, artistic, political and scientific value. Despite the Supreme Court's clear refusal to expand the regulation of indecent speech beyond the broadcast medium,⁴ Congress has begun wielding a hatchet where the constitution mandates a scalpel. In this case, the government attempts to regulate "indecent" audio and visual signal bleed from scrambled programming on cable channels "primarily dedicated to sexually-oriented programming." While this regulatory scheme is limited in scope, *amici* are concerned that, if upheld here, this vague and unconstitutional censorial standard could be applied to the speech that they present.

SUMMARY OF ARGUMENT

"Indecency" is an inappropriate and constitutionally incorrect standard. In *F.C.C. v. Pacifica*, 438 U.S. 726 (1978), the Supreme Court carved out only a narrow exception to the prohibition against content-based regulation of constitutionally protected speech, recognizing the great danger in limiting non-obscene speech with societal value. However, Congress has now begun legislating concerning indecency in a multitude of media within the telecommunications industry. Such congressional activism in the regulation of speech is doubly alarming when the

³ See, e.g., Cable Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, Section 10 (regulating indecent speech in public and leased access cable television), 47 U.S.C. §§ 531, 532(h), 532(j), 558 (1999); Communications Decency Act of The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Sections 502, 230 (regulating indecent communications on the Internet), 47 U.S.C. §§ 223, 230 (1999).

⁴ *Reno v. ACLU*, 521 U.S. 844, 867-70 (1997); *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1989).

category of regulated speech includes material of educational and other serious value.

Instead of employing the adequate protection to minors afforded by the obscenity standards, Congress borrows the mantle of the state's right to safeguard children and misapplies it in a rush to suppress so-called "indecent" speech. *Ginsberg v. New York*, 390 U.S. 629 (1968), sanctioned state involvement in monitoring children's exposure to certain types of speech to the extent it aided parental authority, as long as it remains available to adults. When courts have permitted regulation of indecent speech, they have done so only where it was clear that parents had no means to do so themselves. Section 505 supplants parental authority by imposing automatic scrambling despite the ready availability of parental control through the use of lockboxes. Congress has also, through the enactment of Section 505, violated the limitations on regulation of indecent speech as enunciated in *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1989). Congress no longer feels the need to justify its encroachment on the rights of adult receivers of speech with legislative findings describing the needs and comparative effectiveness of its regulation. Such findings are essential to the judiciary's ability meaningfully to assess the magnitude of the state's interest and the appropriateness of the means of regulation. Such findings are lacking in this instance. Further, in supplanting parental opportunities for control, Congress is usurping their role as protector of minors and ignoring its mandate to regulate constitutionally protected speech only when there are no means available that are less restrictive of First Amendment rights. The Act is also unconstitutional because it employs the unconstitutionally vague standard "indecent" in describing the speech to be regulated.

Finally, the Act rests upon the assumption that the First Amendment protection of identical material varies depending on who the speaker is, even if the nature of the speech is the same.

This is a dangerous notion that violates the Equal Protection Guarantee of the Fifth Amendment.⁵

ARGUMENT

I

THE USE OF AN INDECENCY STANDARD IS INAPPROPRIATE AND UNCONSTITUTIONAL. IT GOES BEYOND MILLER/GINSBERG AND IS VAGUE

Section 505 of the Act is yet another attempt to legislate application of the vague, amorphous "indecent" standard to "protect" minors under the age of 18. This Court, recognizing the First Amendment implications of such "protection," created in *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified in *Miller v. California*, 413 U.S. 15 (1973), a three-part test for determining whether material which is First Amendment protected as to adults is unprotected as to minors. That test requires that material, in order to be constitutionally unprotected as to a minor, taken as a whole, must

- (i) predominantly appeal to the prurient, shameful or morbid interest of minors;
- (ii) be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (iii) lack literary, artistic, political or scientific value.

⁵ Because the three-judge district court found Section 505 unconstitutional on First Amendment grounds, it did not "reach the merits of the other claims put forward by Playboy, that § 505 is unconstitutionally vague and that § 505 violates the Equal Protection guarantee of the Fifth Amendment." *Playboy Entertainment Group, Inc. v. United States of America, et al.*, 30 F. Supp. 2d 702, 720, n. 24 (D. Del. 1998). This Court, of course, is free to reach those merits left unexamined by the court below.

Material under the *Miller/Ginsberg* test can be barred from distribution to minors, so long as such prohibition does not unduly infringe on adult access; it is obscene as to minors and is not constitutionally protected as to them. Material which is protected under *Miller/Ginsberg* has First Amendment protection, whether the recipient be adult or child. Most importantly, under the third prong of the test, material having serious value remains constitutionally protected as to minors, irrespective of its sexually explicit content.

Following the suggestion of the Supreme Court in *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988), many states have held that when material is restricted from access by all minors as a class, in order to fall within the restricted class, material must be obscene to the most mature group of 17-year-olds.⁶ *Virginia v. American Booksellers*, 372 S.E.2d 618 (Va. 1989); *American Booksellers v. Virginia*, 882 F.2d 125 (4th Cir. 1989); *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

Section 505 does not apply the accepted *Miller/Ginsberg* obscenity standard. Rather, it applies an "indecent" standard. While indecency is not defined in the statute, the Federal Communications Commission (the "FCC"), by rule making, has defined indecency as the description or depiction of "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or other MVPD medium." 11 F.C.C. Rcd. 5386, at 4-5 (March 5, 1996); 12 F.C.C. Rcd. 5212 (April 17, 1996). The FCC's interpretation of the word "indecent" does not bring the Act within the *Miller/Ginsberg* standards and it does not cure the Act's vagueness problems for the reasons that follow.

⁶ Until the Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681, 47 U.S.C. § 231 (1999) ("COPA"), no federal statute used the *Miller/Ginsberg* standard. The interplay between COPA and *Virginia v. American Booksellers* has not been determined.

It is important to delineate a number of crucial differences between the obscenity standard and indecency, even as thus defined:

- (a) "Indecent" material is protected by the First Amendment as to minors. Obscene material under the *Miller/Ginsberg* definition is not.
- (b) "Indecent" material includes material which has serious literary, artistic, political or scientific value to minors. Obscene material under the *Miller/Ginsberg* formula does not.
- (c) "Indecency" and "patently offensive" are terms which are unconstitutionally vague. While the *Miller/Ginsberg* test is at times difficult to apply, it has developed meaning over the years and, most importantly, the safety net of serious value protects against the subjective aspect of its first two prongs.

While this Court permitted indecency to be channeled into delineated time slots in *F.C.C. v. Pacifica*, 438 U.S. 726 (1978), this Court has since that decision regularly and repeatedly stressed the fact that the ruling is narrow, applied to broadcast only and governed by the facts of that case. See, e.g., *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 127-28 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). In *Denver Area Educ. Telecommunications Consortium v. F.C.C.*, 518 U.S. 727, 751 (1996), four justices appeared to accept Justice Breyer's conclusion that indecency may not be vague, although the concept "depends on context . . . , degree . . . , and the time of broadcast." However, the subsequent decision of this Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), made it clear that indecency is not a constitutionally appropriate standard outside the factual context of the *Pacifica* case.

In *Reno v. ACLU*, this Court distinguished the facts of *Pacifica* from the Communications Decency Act of 1996

(the "CDA") (which was, like Section 505, part of The Telecommunications Act of 1996) as follows:

As with the New York statute at issue in *Ginsberg*, there are significant differences between the order upheld in *Pacifica* and the CDA. First, the order in *Pacifica*, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when -- rather than whether -- it would be permissible to air such a program in that particular medium. The CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet. Second, unlike the CDA, the Commission's declaratory order was not punitive; we expressly refused to decide whether the indecent broadcast "would justify a criminal prosecution." *Id.*, at 750. Finally, the Commission's order applied to a medium which as a matter of history had "received the most limited First Amendment protection," *id.* at 748, in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.

* *

When *Pacifica* was decided, given that radio stations were allowed to operate only pursuant to federal license, and that Congress had enacted legislation prohibiting licensees from broadcasting indecent speech, there was a risk that members of

the radio audience might infer some sort of official or societal approval of whatever was heard over the radio, see 556 F.2d at 37, n.18. No such risk attends messages received through the Internet, which is not supervised by any federal agency.

* *

Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity.

521 U.S. at 867-70. These distinctions apply equally here. Cable, unlike radio, and just like the Internet discussed in *Reno*, is a form of communication which a citizen must affirmatively seek out and buy; the risk of encountering indecent material by accident is remote; there is little risk that members of the cable audience might infer some sort of official or societal approval of whatever was seen over the cable airwaves; and, finally, cable can hardly be considered a "scarce" expressive commodity. The context in which indecency was permitted to be regulated in *Pacifica*, therefore, is inapplicable to this action.

Applying the *Miller/Ginsberg* obscenity standard to cable transmissions would raise other constitutional requirements. Such a statute would have to be, under *Virginia v. American Booksellers* and its progeny, very narrow. *American Booksellers*, 484 U.S. at 383. The material restricted would have to be obscene to the most mature group of 17-year-olds. Further, the statute could only impose criminal liability on a provider if it comes to the provider's attention that a juvenile is seeking to view such obscene material and the provider fails to attempt to stop such viewing. *Id.*

The statutory term "indecent" also is subjective and vague. What is indecent to one is not necessarily indecent to another. Even if one accepts the gloss that the FCC adds by its regulations, the term "patently offensive" is equally subjective and vague. It is this sort of vagueness in a statute affecting First Amendment freedoms that the Court has said cannot be tolerated:

The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. (footnote and citation omitted). These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. (citations omitted). *Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.* (emphasis added)

NAACP v. Button, 371 U.S. 415, 432-33 (1963). See also *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

Any extension of the indecency standard beyond over-the-air broadcasting concerns *amici*. It is particularly alarming to *amici* that the Federal Government would attempt to impose on an important and promising medium -- namely, cable television -- speech restrictions that greatly exceed in scope the extremely limited regulation of sex-related speech previously condoned by the Supreme Court. As noted, the manner of delivery of information to the American public is evolving at a rapid pace. The one-time universe comprising the arguably discrete worlds of "print" and "broadcast" is no longer. The worlds of print, broadcast, cable and, most recently, on-line and CD-ROM delivery are increasingly converging. *Amici's* members are committed to adapting to provide the same rich diversity of works to the consuming public by whatever avenues technology, and the demands of consumers, dictate. But regulatory approaches such as those here under examination, which treat new media more as speech threats than as speech opportunities, jeopardize the fulfillment of these First Amendment objectives. Such regulation disregards the precise evil the Supreme Court addressed in *Butler v. Michigan*, 352 U.S. 380 (1957), by reducing the cable

viewing options during most of the day and evening to what is suitable for children.

Nor are *amici* assuaged by the fact that Section 505 is apparently limited to indecent material on cable channels primarily dedicated to sexually explicit material. If the utterly vague and undefined indecency standard may constitutionally be applied to the minimal leakage from such scrambled channels, there is no reason why it could not constitutionally be applied to non-obscene material of serious literary, artistic, educational, political, scientific or entertainment value, deemed to be indecent by some, whether on cable or any other of the various media which *amici* use. Such an inroad on the First Amendment rights of both adults and minors is intolerable.

II

SECTION 505 VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT BECAUSE IT SELECTIVELY EXEMPTS NON-ADULT CABLE STATIONS FROM ITS SCRAMBLING AND TIME CHANNELING REQUIREMENTS

Section 505, without any ambiguity whatsoever, specifically applies only to those distributors who provide "sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming." 47 U.S.C. § 561(a) (1999). Excluded are those distributors who, although they may provide sexually explicit or "indecent" material, do so on cable channels that are *not* "primarily" dedicated to sexually-oriented programming. Sexually explicit and "indecent" programming can be seen on cable program services such as Home Box Office ("HBO") and Showtime, and similar fare can be purchased on pay-per-view channels which are not "primarily" dedicated to the kind of constitutionally protected material which Congress sought to regulate via Section 505. In fact, Playboy licenses some of its fare

to such channels.⁷ And yet, these entities need not "fully scramble or otherwise fully block the video and audio portion of [the offending] channel" or comply with subsection (b) of the statute "by not providing such programming during the hours of the day . . . when a significant number of children are likely to view it." 47 U.S.C. § 561(a), (b) (1999). Because this statutory scheme discriminates against those channels which are primarily dedicated to sexually-oriented programming on the basis of the content of their speech (*i.e.*, indecent, but not obscene programming), it runs afoul of the Equal Protection Guarantee of the Fifth Amendment and hence is invalid.

A. Equal Protection Jurisprudence And The First Amendment Prohibit A Government From Creating Arbitrary Classifications Among Media Entities

The Fifth Amendment of the United State Constitution provides in relevant part that "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. This Court has consistently held that the protections afforded by the Equal Protection Clause of the Fourteenth Amendment vis-à-vis state action (*i.e.*, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"), are also available with respect to actions by the Federal Government. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Equal Protection Clause, in turn, requires that classification in laws, at a minimum, meet a standard of rationality and, in cases involving important rights such as the First Amendment, meet a standard of strict scrutiny. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986) ("Whenever a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of that law."). See also *Bery v. City of New York*, 7 F.3d 689, 699 (2d Cir. 1996)

⁷ Playboy Trial Exhibit No. 5, submitted to the court below in connection with Playboy's application for a preliminary injunction, consisted of a list of films licensed by Playboy to HBO including, but not limited to, films such as *Fanny Hill*, *Married People*, *Single Sex 2* and *Sorceress*.

(Equal Protection Clause of the Fourteenth Amendment is violated where city cannot articulate a compelling need for requiring a general vendor's license for visual art while written material may be sold and distributed without a license), *cert. denied*, 520 U.S. 1251 (1997).

This Court has therefore noted that the concerns of both the First Amendment and the Equal Protection Clause are at play when a government attempts -- as does the Federal Government with Section 505 -- to selectively tax, or selectively place a financial burden upon, one media class but not another. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 n.3 (1987) (noting that a First Amendment challenge to a discriminatory tax on the press is "obviously intertwined with interests arising under the Equal Protection Clause") (citing *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972)). And, in this context, the Court has held that "differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233, 250-51 (1936) (a license tax for publications of more than 20,000 is a violation of the First Amendment). See also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (tax exemption based on content of publication violates the First Amendment).

This Court's analysis of discriminatory treatment of the press in the context of selective taxation is equally applicable to, and should be extended to cover, the situation presented by Section 505; namely, an attempt by the government to single out one type of presenter of constitutionally protected speech while allowing other presenters of the same or similar speech to proceed without any such restrictions. The application of First Amendment/Equal Protection Guarantee jurisprudence is appropriate for two reasons. First, the situations are analogous -- in each case the government has selected one group of media entities for discriminatory treatment in an area of speech protected by the First Amendment; thus, the regulation can only survive if the

government can persuade the Court that there is a compelling interest in doing so. There is no compelling reason -- let alone any rational reason -- for forcing Playboy to eliminate 100% of its signal bleed in order to protect the nation's children (or forcing it into time channeling if it cannot), while, at the same time, permitting others similarly situated to proceed without such a requirement. Second, *amici* have a legitimate concern that, if permitted in this context, the government may extend its attempts to selectively burden providers of disfavored material.

B. There Is Neither A Compelling Nor A Rational Reason For Singling Out Adult-Only Cable Stations For Section 505 Treatment

In *Boothby v. City of Westbrook*, 23 A.2d 316, 319 (Me. 1941), the Maine Supreme Court articulated a useful summary regarding a government's power to constitutionally regulate similarly situated citizens:

A regulatory ordinance passed [by a city] pursuant to a general legislative grant of power must be reasonable and not arbitrary and operate uniformly on all persons carrying on the same business under the same conditions.

Similarly, following the lead of this Court, federal courts have noted that the discriminatory application of rules designed to regulate the content of constitutionally protected speech is, absent a compelling government interest, constitutionally invalid. In *Action for Children's Television v. F.C.C.*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996), for example, the United States Court of Appeals for the District of Columbia Circuit generally approved the adoption of a safe harbor approach to regulate free, over-the-air broadcasting. But it nevertheless struck down the discriminatory application of the indecency rules, whereby the law permitted certain public broadcasters to begin transmitting indecent programming at 10:00 p.m., instead of midnight, as was the rule for all other licensees. The court found that such a "selective exemption" or "preferential safe harbor" for

certain stations as opposed to others “undermin[ed] both the argument for prohibiting the broadcasting of indecent speech before that hour and the constitutional viability of the more restrictive safe harbor.” *Id.* at 668. The court found that such “disparate treatment” left it “no choice but to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight” because “Congress . . . fail[ed] to explain how this disparate treatment advanced its goal of protecting young minds from the corrupting influences of indecent speech[.]” *Id.* at 668-69. There is a similar infirmity to Section 505 – if the evil to be eradicated is the momentary unscrambled image and sound of indecent sexual behavior, then applying the absolute scrambling mandate to one provider but not to others undermines the very argument for mandating absolute scrambling in the first place. Furthermore, this discrimination cannot be justified under the guise of addressing a problem “one step at a time” because, although this Court has upheld some targeted classifications on the theory that the legislature may adopt incremental solutions, *see, e.g., Williamson v. Lee Optical of Okl.*, 348 U.S. 483, 488-89 (1955), there is no presumption of validity where a classification turns on the content of speech.⁸

C. The Act’s Discriminatory Treatment Of Similarly Situated Providers Of Constitutionally Protected Speech Concerns Amici Beyond The Facts Of This Case

Amici do not suggest that Section 505 would be constitutional even if it applied to *all* distributors of “sexually explicit adult programming or other programming that is indecent.” 47 U.S.C. § 561(a) (1999). To the contrary – for the reasons set forth above (and for the reasons articulated by *F. Boy* and adopted by the court below), Section 505, even if it were of general applicability, would violate the First Amendment because

⁸ *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

it uses the unconstitutional indecency standard and because it does not employ the least restrictive means of addressing the problem of signal bleed. However, it is still the case that the statute blatantly discriminates against one class of constitutionally protected speakers as opposed to other similarly situated speakers. The fact that the statute does not operate with an even hand is evidence in and of itself that it is not constitutional. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (city ordinance prohibiting the ritual slaughter of animals by a specific group violates the First Amendment because, among other reasons, it does not apply to other slaughterers of animals).

Furthermore, if permitted in this limited context, the discriminatory concept underlying Section 505 of the Act could be applied to providers of other types of constitutionally protected speech such as *amici*. If the Court were to conclude that Section 505 is not violative of the Equal Protection Guarantee of the Fifth Amendment, there would be nothing amiss in forcing one specific, perhaps unpopular, provider of speech to take special precautions and shoulder special financial burdens to “protect youth,” while not imposing similar burdens on other providers of the same or similar speech. All members of *amici*, and therefore by extension the reading public, would be at risk.

* * *

“Nowhere are the protections of the Equal Protection Clause more critical than when legislation singles out one or a few for uniquely disfavored treatment.” *News America Pub., Inc. v. F.C.C.*, 844 F.2d 800, 813 (D.C. Cir. 1988). Because Section 505 selectively burdens one provider of constitutionally protected speech while other providers of the same or similar speech are unburdened, and does so on the basis of a characterization of the overall content of that provider’s speech and without any rational or compelling reason for doing so, it is violative of the Fifth Amendment’s Equal Protection Guarantee and hence is constitutionally invalid.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in the decision below, the judgment below should be affirmed and Section 505 of the Act declared unconstitutional.

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Respectfully submitted,

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APPENDIX A: THE AMICI

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately 200 members include most of the major commercial book publishers in the United States. AAP members publish most of the general, educational, and religious books produced in the United States.

The Comic Book Legal Defense Fund ("CBLDF") is an organization dedicated to defending the First Amendment rights of the American comic book industry. CBLDF represents artists, publishers and distributors, as well as the broader community of specialty retailers and readers.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The International Periodical Distributors Association is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Motion Picture Association of America, Inc. is a not-for-profit corporation founded in 1922 for the purpose of promoting the interest of the motion picture industry in the United States and helping the industry maintain high standards and public goodwill.

The National Association of College Stores, Inc. is a trade association comprised of approximately 3,000 college stores located throughout the United States.

The National Association of Recording Merchandisers is an international trade association whose more than 1,000 members represent recorded entertainment retailing, wholesaling, distributing and manufacturing.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

The Publishers Marketing Association ("PMA") is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. The PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade.

The Recording Industry Association of America, Inc. ("RIAA") is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

The Video Software Dealers Association is the trade association for the home video entertainment industry. It represents more than 3,500 member companies in North America.